

QUARTERLY REPORT
Of the
ATTORNEY GENERAL
Of
ALABAMA

For the Period
April 1, 1944
Through June 30, 1944
Volume XXXV

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from April 1, 1944, through June 30, 1944.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
WILLIAM N. McQUEEN,
Acting Attorney General.

WETUMPKA PRINTING CO.

Printers and Publishers

Wetumpka, Ala.

1944

OPINIONS

April 3, 1944.

Hon. Frank C. Manning,

Tax Collector,

Madison County,

Huntsville, Alabama.

Soldiers' and Sailors' Civil Relief Act of 1940, as amended—Taxation—Tax Sales.—

Under the provisions of Article V, Section 500, Soldiers' and Sailors' Civil Relief Act of 1940, as amended, no "real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees" may be sold to enforce the collection of any tax or assessment due on the same, nor may any proceeding or action for such purpose be commenced.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of March 22, 1944, is as follows:

"Can lands assessed for 1943 taxes be sold for the taxes where the owner of such lands is in the armed forces? One such case we have had, but the mortgagee paid the taxes today. We do not know, but there will be more cases of this nature and, therefore, would like to know the procedure."

In answer to your inquiry, I wish to direct your attention to Article V, Section 500, of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended by Act of May 14, 1942 (Public Law 554, 77th Congress), and Act of October 6, 1942 (Public Law 732, 77th Congress), which Section is as follows:

"Sec. 500. (1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purposes commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may

stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes shall also include such interest thereon."

Under the provisions of paragraphs (1) and (2) of the above quoted Section, no "real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees" may be sold to enforce the collection of any tax or assessment due on the same, nor may any proceeding or action for such purpose be commenced. This applies to taxes or assessments whether falling due prior or during the period of military service of the owner.

Under the provisions of Title 51, Sections 189-236, Code of Alabama 1940, it is the duty of the tax collector of a county to collect ad valorem taxes. The authority to sell land for the nonpayment of taxes is vested in the probate court of the county in which the land lies. Title 51, Section 249, Code of Alabama 1940. The authority of the probate court to render a decree of sale of land for the nonpayment of taxes is contained in Title 51, Section 258, Code of Alabama 1940.

In the event the tax collector deems it necessary or advisable to sell lands owned by a person in the military service to pay taxes due thereon, and which can not be sold under the provisions of Section 500 (2), supra, except upon leave of the court he may, under the provisions of said Section 500 (2), make application to the probate court to sell such lands. On a consideration of such application, the court, unless in its opinion the ability of the person in military service to pay such taxes is not materially affected by reason of such service, may order a sale of the land for the payment of the same. If, on the other hand, the court is of the opinion that the ability of the person in military service to pay such taxes is materially affected by such service, it may refuse to order the sale, "for a period extending not more than six months after the termination of the period of military service of such person."

While a consideration of paragraphs (3) and (4) of Section 500, supra, is not necessary in answering your inquiry, I thought it advisable to call them to your attention.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

Hon. Sim L. Howell, Chairman,

Morgan County Board of Revenue and Control,

Decatur, Alabama.

Title 12, Section 12, Subsection 22.—Appropriation by County Board of Revenue to Chamber of Commerce not shown to be authorized under facts stated.

County—Board of Revenue and Control (Morgan County). Appropriation by County Board of Revenue to Chamber of Commerce not shown to be authorized under facts stated. Title 12, Section 12, Subsection 22.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of March 22, 1944, is as follows:

"The Board of Revenue and Control of this county has made an appropriation of \$500.00 to the Chamber of Commerce of the City of Decatur and has directed me to pay the same upon being satisfied that authority exists for the appropriation.

"Please advise me whether or not under Subdivision 22 of Section 12 of Title 12 of the Code of Alabama of 1940, or any other statute, this county has authority to make such an appropriation.

"The Chamber of Commerce is engaged in the usual activities of Chambers of Commerce and makes an effort by advertisement, personal contact and other means to bring industry into Decatur and to promote the agricultural industries in Morgan County."

In my opinion the facts stated in the inquiry are not sufficient to show that the appropriation of \$500.00 is authorized within the meaning of Title 12, Section 12, Subsection 22, Code of Alabama 1940. This statute provides:

"§ 12. Authority of court.—The court has authority: *** 22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties."

The appropriation described in your inquiry is not shown to be authorized for the reason that it does not appear that the money appropriated will be

used for the purposes set out in subsection 22, supra. It is stated in your inquiry that the Chamber of Commerce is engaged in the usual activities of Chambers of Commerce, which activities to a large extent encompass the subjects covered in subsection 22, supra. Of course we know that the Chamber of Commerce is not only engaged in activities that may be identical with those subjects enumerated in subsection 22, but this organization is usually engaged in other activities which could not be identical with those subjects in subsection 22.

There is no doubt in my mind that the Board of Revenue and Control of the County of Morgan intended to confine the use of the money appropriated to those uses enumerated in subsection 22, supra. Your inquiry, however, does not state that the Board, in making the appropriation to the Chamber of Commerce, limited the use of the money in any way. For this reason, therefore, the appropriation of \$500.00 is unauthorized and void.

You are further advised that in the event the limitations upon the use of the appropriation are made, another question will arise which is not covered by this opinion, namely, whether the County Board of Revenue may designate a Chamber of Commerce to perform the activities listed in subsection 22, supra, in place of the County Board.

See Quarterly Report of Attorney General, Vol. 23, page 102, and *Stone vs. State of Alabama*, 223 Ala. 426, 136 So. 727.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 5, 1944

Hon. Jas. T. Beeland,
Judge of Probate,
Butler County,
Greenville, Alabama.

Acts 1943, page 119—Birth certificates—

The provisions of Act No. 118, H. 113, approved June 8, 1943 (Gen. Acts 1943 p. 119) do not apply to children born in other states although at the time of birth the parents of such children may have been legal residents of the State of Alabama. Said Act applies only to persons born in Alabama or in a foreign country. The probate court, circuit court, or other court of like jurisdiction is without jurisdiction to entertain a proceeding under said Act with respect to children born in other states.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 31, 1944, is as follows:

"Please give me your opinion on the following with reference to Act No. 118—H. 113:

"Under the terms of said Act could we proceed to establish a record of birth of the child in the following cases:

"(a) wherein the child was born in another state of parents who were legal residents at the time of his or her birth of the state of Alabama, Butler County. Section 1 of said Act states 'That any person born in this State or in a foreign country of parents who were legal residents of the State at the time of his or her birth, may petition the probate court . . . of any county in which he or she resides or was born for an order establishing a public record of the time and place of his or her birth and of his or her parentage . . .', but there is no specific reference to a person born in another state of parents who were legal residents of Alabama at the time of the child's birth. There is no record of the child's birth in the other state.

"(b) wherein the child was born in another state at which time the parents were legal residents of said state, but have subsequently taken up residence in Alabama. There is no record of the child's birth in the other state."

Act No. 118, H. 113, approved June 8, 1943 (General Acts 1943, p. 119) provides only for birth certificates of persons born in this State, or in a foreign country, whose parents were legal residents of Alabama at the time of birth.

The procedure prescribed is strictly statutory. The order to be made

thereunder must recite the "jurisdictional facts," otherwise such order would be void on its face.

Inasmuch as no provision is made in said Act for obtaining a birth certificate for a person born in another state as distinguished from "a foreign country" although the parents at the time of birth may be legal residents of Alabama, I am of opinion that the Act does not authorize the issuance of such certificates for persons born in other states. No doubt this seeming omission is due to the fact that in other states adequate provision has already been made for registration of births therein, although the parents of children so born were not legal residents of the state where birth occurred.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 6, 1944.

Hon. Hayse Tucker,

Director of Finance,

Department of Finance,

Montgomery 4, Alabama.

Constitution 1901, Section 257—Trusts—Expenses of Operation—
Title 8, Section 240.

Actual and necessary expense of cruising timber on 16th Section School Lands may be charged against sale price of such timber and paid to Department of Conservation upon completion of each such sale.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

Your request for an official opinion, bearing date of March 30, 1944, is as follows:

"Section 257 of the Constitution of Alabama of 1901 provides for the preservation of the principal of all funds arising from the sale or other disposition of the 16th Section Lands. The force and effect of this section has been construed to impress a trust upon such funds. Title 52 of Section 566 authorizes a payment of 6% interest by such trust to the public schools of the State upon such funds.

"Please render your official opinion as to whether or not the cost of maintenance and operation of this trust may be deducted from the income therefrom, and also whether or not the expenses necessarily incident to surveying and cruising timber on such 16th Section Lands may be considered as expense incident to the operation of the trust and therefore

paid out of the proceeds of the sale of such timber, which sale was consummated as a direct result of the surveying and cruising of timber.

"Inasmuch as this department is now confronted with the proposition outlined herein, your prompt attention will be appreciated."

Section 257, Constitution of Alabama 1901 provides as follows:

"Sec. 257. The principal of all funds arising from the sale or other disposition of lands or other property, which has been or may hereafter be granted or entrusted to this state or given by the United States for educational purposes shall be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific object of the original grants or appropriations."

This section 257, *supra*, provides the use of the income from funds and this necessarily presupposes an investment. Accordingly, we have an operating effective trust from which arises, normally, the expenses of maintenance and operation.

The general laws governing trusts, wherein no specific provision to the contrary appears, provide that the cost of operation and maintenance of the trust fund shall be borne by the fund itself, and the expenses incurred in connection with the income from an investment of the principal shall be paid from said income. 65 C. J. 705, 706, 908; *Dent et al vs. Fey et al*, 214 Ala. 243, 107 So. 210; Ala. Digest Vol. 19, Trusts Key No. 274.

Title 58 of the 1940 Code of Alabama, wherein the general laws governing trusts are recited, provides for the payment of expenses in the same manner as set out hereinabove.

Title 8, Chapter 5, Sections 232, 252, inclusive, 1940 Code of Alabama, provide that the Director of the Department of Conservation shall, if he deem advisable, have title cleared, land surveyed, and timber cruised on school lands; and among other duties and powers placed upon the Department of Conservation in these code sections is Section 240 of Title 8, which provides as follows:

"Sec. 240. Disposition of revenue from school lands.—The Revenue derived from any sale of timber or minerals from, or rental or lease of, any school lands shall be paid by the director of conservation to the treasurer to be deposited to the credit of the proper township or townships as provided for by the constitution and laws of Alabama. **An itemized statement of the revenue derived from such sale or lease shall be immediately forwarded by the director of conservation to the state superintendent of education, and such statement shall show the items of sale, the amount of revenue derived therefrom and a description of the land from which the sale or lease was made.** The superintendent of education, upon receipt of such itemized statement, shall immediately cause a report to be transmitted to the treasurer showing which township or townships shall receive credit for such revenue and the amount of credit which shall be made thereto. (Underscoring supplied.)

Considering the fact that said Section 240, *supra*, provides for an itemized statement of the revenue derived from a sale of the timber on 16th Section

School Lands, we must again presuppose that such itemization shall include any disbursements for the actual expenses incurred in the consummation of the sale, for if the gross amount were payable, the necessity of itemization would be obviated.

Therefore, it is my opinion that it is within the power of the Director of the Department of Conservation to have 16th Section School Lands cruised or surveyed, where the same is necessary to complete a sale of the timber rights thereon, and that actual and necessary expenses incident to such cruise or survey are payable out of the proceeds of the sale of such timber.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 13, 1944.

Hon. James F. Stoner, Chairman,
Alabama Milk Control Board,
705 S. McDonough Street,
Montgomery, Alabama.

An individual producer-distributor does not lose his status as such by becoming a member of a cooperative.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of March 22, 1944, is as follows:

"There seems to be a question in the minds of some of our dairymen as to whether or not I have the qualifications required by the Milk Control Law to serve as a Producer-Distributor member on the Milk Control Board.

"I believe you are familiar with the type of operation carried on by me, however, for your information I will try to outline it briefly so that you may review it.

"On my own farm I still keep a herd of dairy cows and produce about as much milk for the Montgomery Market as I did when I operated as an individual producer-distributor. On November 1, 1942 several of us who had been producing and distributing our own milk combined our distributing operations and established Dairy Producers Cooperative.

"Our cooperative is set up according to the requirements of the Cooperative Marketing Act of Alabama. All members are required by our by-laws to be producers of milk and, since this is a mutual undertaking, it seems to me, are all distributors. Therefore, we contend that we are

producer-distributors. The Federal Government through its Office of Price Administration recognizes us as such.

"If you will render an opinion on this matter I will appreciate it very much indeed. If there is further information that you need please feel free to call on me for it."

It is my opinion, under the facts stated in your inquiry, that you are a producer-distributor as the term is defined in the Milk Control Act.

Title 22, Section 206, Code of Alabama, 1940, defines producer-distributor as "A producer who distributes milk by whatever device, means or method which he produces, to milk dealers, stores, hotels, cafes, hospitals, restaurants, wholesale dealers, other producer-distributors, consumers or consumers' agents."

Under this definition if the Dairy Producers Cooperative is the means or method by which you produce and distribute milk, you would be a producer-distributor.

Furthermore, inasmuch as your activities as an individual constituted you a producer-distributor, the fact that you became a member of a cooperative, and continued those activities through the channels and means prescribed by the cooperative, would not deprive you of your status as a producer-distributor.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 13, 1944.

Hon. W. A. Weaver,

County Solicitor,

St. Clair County,

Pell City, Alabama.

Office of County Service Commissioner can not be maintained at branch court house, but is required to be kept in the court house at County Seat.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of March 16, 1944, is as follows:

"The Legion Post has asked the Commissioners Court to appoint a County Service Commissioner for this County. As you are aware, this

County has two Court houses but the Supreme Court has held that the Court house at Pell City is nothing more than a branch of the one at Ashville.

"The act providing for the appointment of such a Commissioner is found on page 587 of the last General Acts. The County Commissioners, of course, desire to have this party operate the office at the least possible expense. The person who will probably be selected by the Commissioners Court out of the three named by the Post lives at Pell City. The act provides that this Commissioner shall maintain an office at the County Seat.

"The Commissioners desire to know whether he could maintain an office at the County Seat within the law by keeping an office open there, say one day each week, and on other days being in Pell City. The distance from Pell City to Ashville is about 25 miles and the cost of going to and from Ashville during the course of the year would be considerable. Also we would like to know if he could use the stationery and supplies at Pell City furnished by the County as provided for in the act."

It is my opinion that an office for the County Service Commissioner can be maintained only at the County Seat, and that the county governing body is without authority to furnish an office at a branch courthouse situated elsewhere in the county.

Act No. 586, General Acts of Alabama 1943, Page 587, creating the office of County Service Commissioner, in Section 5 thereof, provides as follows:

"The County Service Commissioner shall maintain an office at the county seat, and shall be a resident of said county during his term of office."

In the cases of **Matkin vs. Marengo County**, 137 Ala. 155, 34 So. 171, **Merchants National Bank vs. McNaron**, 172 Ala. 469, 55 So. 242, **Board of Revenue of Jefferson County vs. Huey**, 195 Ala. 83, 70 So. 744, and **Pitts vs. Culpepper**, 229 Ala. 449, 157 So. 841, the Supreme Court of Alabama held that the establishment of a branch courthouse in a city other than the County Seat, did not make such city the County Seat, that the County Seat remained unchanged as the center of the county governmental activities, and that the branch courthouse was merely established for the convenience of the public.

Therefore, in view of the requirement of the above quoted Section 5, that the office of the County Service Commissioner be maintained at the County Seat, and inasmuch as the courthouse at Pell City, being only a branch courthouse, cannot constitute the County Seat, it is my opinion that the office of County Service Commissioner must be maintained at Ashville, and only when such office is so maintained, is the county authorized to make expenditures for the cost of such maintenance.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 14, 1944.

Hon. H. M. Brittain,
Judge of Probate,
Randolph County,
Wedowee, Alabama.
Statute of Limitations—

Claims against counties which must be presented, audited and allowed, and are not fixed by law, must be presented within twelve months.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of March 17, 1944, is as follows:

"The Superintendent of Education of Randolph County has presented to me a claim for telephone bills paid by him over a period of three years. These claims are all calls that are official as to his office.

"I wish your opinion as to whether or not the Statute of Limitations has run as to all calls that run for more than twelve months prior to the filing of the claim.

"The only opinion that I can find that might place these claims without the Statute is an opinion rendered to the Board of Revenue of Calhoun County on February 15th, 1939, which opinion is shown on page 123, Jan-March, 1939, Quarterly Report of the Attorney General. This opinion I am not able to construe as covering the case at hand.

"Please let me have this opinion at your earliest convenience as the Superintendent has filed his income tax report without listing the calls as a part of his personal expense."

You are advised that Title 12, Section 118, Code of Alabama 1940 bars the claims of the County Superintendent of Education that were not presented to the Board of Revenue of Randolph County within twelve months after the time that such telephone bills accrued. The authority of the County Board of Revenue to pay for telephone service incurred by the County Superintendent of Education is found in the latter part of Title 52, Section 130, Code of 1940:

"§ 130. *** The county board of revenue or court of county commissioners shall provide the county superintendent of education and his professional and clerical assistants with ample, convenient and comfortable office quarters. The county board of revenue or court of county commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms, and supplies required by the county superintendent of education and his assistants."

This office has held that the above quoted code section authorizes the Court of County Commissioners or the Board of Revenue to pay for telephone service for the County Superintendent of Education. Biennial Report of Attorney General 1926-1928, page 567.

Title 12, Section 118, Code of Alabama 1940 provides as follows:

"§ 118. All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

The opinions heretofore rendered by this office have drawn a distinction between claims against the county which must be presented to the county governing body, audited, itemized and allowed. The former type (where the amount of the claim is fixed by law) is not required to be presented within twelve months after the time they accrue. Quarterly Reports of the Attorney General, Vol. XIV, page 123. It is my judgment, however, that a claim against the county by the County Superintendent of Education for the amount of telephone bills is a claim which must be presented to the county governing body, itemized, audited and allowed. The law does not make certain nor fix the amount to be allowed the County Superintendent of Education for telephone bills. It follows, therefore, that since this claim is the second type enumerated above, such claim is subject to Title 12, Section 118, Code of Alabama 1940 barring claims against the counties not presented within twelve months after the time they accrue or become payable. Biennial Report of the Attorney General, 1934-36, page 372; Biennial Report of the Attorney General, 1926-1928, page 40; Quarterly Report of the Attorney General, Vol. XIV, page 123.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 17, 1944.

Hon. I. J. Browder, Director,

State Personnel Department,

Montgomery 4, Alabama.

Jefferson County Board of Registrars are not subject to the State Merit System.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion bearing date of April 12, 1944, is as follows:

"I shall appreciate having your opinion at your earliest convenience as to whether or not employees of the Jefferson County Board of Registrars should be considered subject to the State Merit System Law.

"The question has arisen in my mind due to the fact that the salaries of these employees are paid by the county, and in addition, the fact that they are housed in the County Court House, and for all intents and purposes are county employees, except that in the past they have been considered subject to the State Merit System Law.

"I should like to call your attention to the following excerpt from Article 294, Chapter 8, Title 55 of the Code of Alabama:

" "State service" means all offices and positions of trust or employment in the service of the Alabama state government, irrespective of whether the remuneration or compensation of such offices and positions of trust or employment be paid out of the state treasury or not, but "State service" **shall not include offices and positions of trust or employment of the local governmental subdivisions thereof, . . . "**

In my opinion your inquiry must be answered in the negative.

There appears no doubt that the Jefferson County Board of Registrars is a State and not a County Agency; in fact the Supreme Court passed upon this identical proposition in **Garner, County Treasurer, v. McCall**, 235 Ala. 187, 178 So. 210, wherein it referred to the Jefferson County Board of Registrars in the following words:

"The board of registrars is as much an independent agency of the state for statewide purpose as the county board of education."

The code provisions you cite must be considered in *pari materia* with Section 301, of the same Title; the latter divides positions in the service of the state into three classes, namely "exempt, classified and unclassified" and provides that:

"The exempt service shall include: *** Members of boards and commissions, whether appointed or selfperpetuating, and heads of departments required by law to be appointed by the governor or by boards or commissions with the approval of the governor. *** The services here listed as exempt shall in no respect be subject to the provisions of this chapter, anything to the contrary notwithstanding."

A persusal of Section 21, et seq. Title 17, Code of 1940, and Sections 186, et seq. of the Constitution clearly defines the County Board of Registrars, their members, duties, et., and, in my opinion the members of such Boards belong to the class specifically exempted from the Merit System statutes under the provisions of Section 301 thereof.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 17, 1944.

Hon. Ben C. Morgan,

Director of Conservation,

Department of Conservation,

Montgomery 4, Alabama.

Solicitor's Fee—

Fee of five dollars prescribed by Title 8, Section 50, Code of 1940 should not be taxed in cases where solicitor fails or refuses to prosecute.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of April 10, 1944, is as follows:

"Under Section 50, Title 8 of the 1940 Code of Alabama, the solicitors are charged with the duty of prosecuting violations of the game and fish laws.

"In a lot of counties they not only do not assist in the prosecution of these cases, but will not do so. In cases where the solicitor does not appear, is it compulsory upon a presiding judge to assess a prosecutor's fee in case of conviction?"

It is my opinion that when the solicitor or deputy solicitor of any county fails or refuses to prosecute violations of the provisions of the game and fish laws or any rules and regulations provided thereunder, the solicitor's fee of five dollars should not be added to the costs as prescribed by Title 8, Section 50, Code of Alabama 1940.

As your inquiry states it is mandatory that the solicitor or deputy solicitor appear in behalf of the State and prosecute any person charged with the violation of the Alabama Game and Fish Law. Biennial Report of Attorney General, 1934-36, page 586. This is one of the duties that the solicitor has sworn to "faithfully and honestly discharge." Constitution 1901, Section 279.

When the Legislature prescribed a solicitor's fee of five dollars to be taxed as costs upon conviction in cases of this type, they assumed that the solicitor would appear and prosecute and thereby perform the duty made mandatory. When the solicitor fails in this duty or refuses to perform this duty, the authority to tax the fee of five dollars for his services does not exist.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 17, 1944.

Hon. M. E. Cannon, Treasurer,
Covington County,
Andalusia, Alabama.

COUNTIES

Authority of county governing bodies.

1. The Act of the Legislature of Alabama, Acts 1943, pages 587-589, does not authorize governing bodies of the counties to pay the expenses of the County Service Commissioner in attending training Schools.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of April 11, 1944, is as follows:

"The Court of County Commissioners of Covington County has appointed a County Service Commissioner, as provided for in Act No. 586 of the 1943 Legislature.

"The Service Commissioner desires to attend a training school to be held in Montgomery on April 12th, 13th, and 14th. The Court would like to pay his expenses to this school if they can legally do so.

"Under Section No. six of the Act creating the Service Commissioner's Office, a portion of which reads as follows:

"The County Service Commissioner shall be furnished an office at the expense of the county and shall be allowed all necessary expenses for the conduct of his office, including clerical or stenographic assistance, and such travel expense within the county as may be necessary for the purpose of carrying out the provisions of this Act."

"In view of this Section, would the payment of expenses to the training school to Montgomery be legal payment by the Court of County Commissioners?"

The statute to which you refer is to be found in General Acts 1943, pages 587-589. The principle of law controlling your question has been many times and for a long time presented to and passed upon by our Supreme Court. It has been the settled law of this State for at least one hundred years that all the power and authority with which counties are entrusted are the powers of the state and that the duties with which they are charged are the duties of the state. The counties act, and can act, only to the extent and within the powers granted to them by the legislature. This principle applies to county and state officials.

This principle is of such long standing and so well known by the bench and bar that we will only cite a few decisions of the court.

Naftel v. County of Montgomery, 127 Ala. 563, 567;

Mobile County v. Williams, Judge, 180 Ala. 639, 647;

State ex rel Towle v. Stone, County Treasurer, 236 Ala. 82, 84;

Rhodes v. Marengo County, 205 Ala. 667;

Tuscaloosa County v. Alabama Great Southern Railroad Co., 227 Ala. 428, 432.

In announcing this principle the court has not always stated the principle in the language set forth above, but it is all to the same end. We will quote the language of a few decisions on this principle, where it has been applied to different conditions.

In the *Naftel* case, *supra*, the court uses this language:

"The county can be charged only with such expenses as are authorized by law and unless there is some statute which authorizes the judge of the circuit court to direct the sheriff to provide carriages to convey the grand jurors to the jail for the purpose of inspecting it the expense thus incurred cannot be collected out of the county."

Further quoting from this opinion, the court said:

"No claims are chargeable on the county treasury, nor can be paid therefrom, except such as the law imposes on the county or empowers it to contract. No officer of the county can charge it with the payment of other claims, however meritorious the consideration or whatever may be the benefit the county may derive and enjoy from them."

In discussing these general principles the court in the *Mobile County* case, *supra*, uses this language:

"The law of fees and costs must be held to be penal and no fee must be demanded or received except in cases expressly authorized by law."

The court further said:

"A person claiming fees or costs must point to a definite law authorizing it. The law may not be extended beyond its letter. The law may impose duties upon public officers without providing compensation therefor."

The court further said:

"An officer demanding fees for services rendered must point to some clear and definite provision of the statute which authorizes the demand and the compensation cannot be allowed unless it is conferred by a strict construction of the language employed in the statute."

In *State ex rel Towle v. Stone*, *supra*, the court expresses the principle involved in this language.

"The law of this State (however it may be in other jurisdictions) is long and well settled that counties are governmental agencies of the state, and that they are therefore chargeable with and liable for those claims or demands—and those only—which the law imposes upon them or empowers them to contract for. No officer can charge the county with the payment of any claim due him, however meritorious or whatever benefit the county may have derived therefrom unless expressly or necessary implication are authorized by law."

When the Act of the Legislature, now under review, is considered in the light of the foregoing principles and authorities, it becomes irrefutably obvious that the Act does not delegate to the counties authority to pay the expenses of the County Service Commissioner to attend a training school at Montgomery, or elsewhere.

The language you quote from Section 6 of this Act certainly is not broad enough to authorize such payment. It specifically confines travelling expenses to travel within the county. The expression "all necessary expenses for the conduct of his office" confessedly is not meant to pay the Service Commissioner for expenses in fitting himself to discharge the duties of the office or enable him to discharge such duties more adequately. Under that course of reasoning the Service Commissioner and the county governing body may conclude that the services to be rendered could be discharged in a more excellent and efficient manner by the Service Commissioner taking a four-year course of special training at the Polytechnic Institute at Auburn, or at the University of Alabama, Yale or Harvard.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 18, 1944.

Hon. Julian Harris, Judge,

Circuit Court,

Morgan County,

Decatur, Alabama.

Code 1940, Tit. 52, §§ 156, 157; Title 12, § 4—City Board of Education—City Treasurer of City School Funds—Official Bond—

City Board of Education is not authorized by designation of bank or trust company as depositor for city school funds thereby to avoid the requirements of Code 1940, Tit. 52, §§ 156, 157, with reference to execution of an official bond by the city treasurer or other person elected as such by the board or to relieve such treasurer from liability on his official bond for loss arising upon insolvency of such depository.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of April 10, 1944 is as follows:

"I do not know whether the City Board of Education is such a body as is authorized under the law to request an opinion from your office, but if it is, our Board in this city is anxious to have your opinion on the following question:

"Is the Board of Education, under the law, authorized to pass the following resolution?

"Confirm the adoption of the following resolution approved by telephone March 3, 1944: "Be it resolved by The Board of Education of the City of Decatur, Alabama that The Morgan County National Bank of Decatur, Alabama be and is hereby designated as the depository of all funds belonging to the said Board of Education and the Treasurer of the Board of Education is hereby instructed and ordered to deposit all funds of whatever nature received by him in said depository and the Treasurer is hereby relieved from any deposit liability in so doing."

"It is difficult to get any one to serve as Treasurer of the Board of Education, and the bonding company will not execute the bond without such resolution. The statute, however, requiring the Treasurer to be bonded makes no conditions or exceptions, and we doubt the legality of such an order. Necessity almost requires the order, and if it could be construed as legal we would feel more secure with an opinion to that effect from you."

Code 1940, Title 52, Section 156, provides that the city treasurer shall be custodian of the school funds of the city, but authorizes the city board of education to select some other person to perform the functions of such custodian.

Section 157, of Title 52, provides that before assuming such duties, such custodian, whether he be city treasurer or a treasurer elected by the city board of education, must execute an official bond in amount fixed by the State Superintendent of Education and to be approved by him, with a surety company as surety, conditioned for the faithful performance of the duties of his office and to account for moneys coming into his hands. Said section further requires a certified copy of such bond to be filed in the office of the Department of Education, and provides that no public funds shall be paid to such treasurer or custodian without compliance with the aforementioned requirements.

I am unable to find any provision of law whereby a city board of education may abrogate or nullify these positive provisions of law, by adoption of a resolution, or otherwise.

It is true that under Code 1940, Title 12, Section 4, a county treasurer of school funds may by application to the county board of education require it to designate a depository for such funds and thereby escape liability upon his

official bond for loss arising from insolvency of such depository. This statute, however, is obviously without application to a treasurer or custodian of city school funds, and cannot by implication be extended to include a city custodian or treasurer of school funds.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 20, 1944.

Hon. Preuitt Simms,

Senior Administrative Assistant,

Department of Agriculture and Industries,

Montgomery, Alabama.

Sale of colored oleomargarine is not prohibited by any Alabama statute.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of February 16, 1944, is as follows:

"Will you please advise me whether or not colored oleomargarine may be sold in the State of Alabama?"

It is my opinion that colored oleomargarine may be sold in the State of Alabama.

The Legislature of Alabama has enacted no statute expressly prohibiting the sale of oleomargarine in this State. However, your attention is directed to Title 2, Section 201, Code of Alabama, 1940, which defines imitation butter as "every article substitute or compound, save that produced from pure milk or cream from milk cows, made in the semblance of or designed to be used for and in the place of butter." This section further prohibits the sale of such imitation butter. Title 2, Section 202, Code of Alabama 1940, permits the sale of substitutes for butter, when such substitutes do not have a yellow color.

The purpose of Section 201 was stated by the Legislature in Title 2, Section 186, Code of Alabama, 1940, in the following language:

"The purpose of the provisions of this article is to promote the dairy-ing interest of the state, to secure to the public wholesome, clean and nutritious milk, cream, butter and by-products of the same, and to prevent frauds upon the public in connection therewith."

With this legislative purpose in mind it is necessary to determine whether colored oleomargarine is in fact an imitation of butter, and whether its sale

constitutes a fraud upon the public within the meaning of Title 2, Sections 186 and 201, Code of Alabama, 1940.

The Supreme Court of Alabama, although not having passed upon this identical question, in the case of *Cook v. State*, 110 Ala. 40, 20 So. 360, did rule upon a statute designed to prohibit the sale or manufacture of certain products designed to prohibit the sale or manufacture of certain products constituting imitation butter. In that case a conviction for a sale of yellow oleomargarine was sustained by the higher court. However, the criminal statute under consideration in the *Cook* case was expressly directed toward the sale of any product "made wholly or partly out of any fat, oil, or oleaginous substance" of a yellow color, which, of course, was an express prohibition against the sale of yellow oleomargarine. Such is not the case here. The said Section 201 contains no reference to oleomargarine or oleaginous substance; rather it, in general terms, prohibits the sale of those articles which, in fact, constitute imitation butter.

In the absence of any expression by our Supreme Court on this specific question, reference is made to decisions of other jurisdictions which furnish a guide in the interpretation of the Alabama statute.

In the case of *Baltimore Butterine Company v. Talmadge*, 32 Fed. 2d. 904 (affirmed by Circuit Court of Appeals in 37 Fed. 2d, 1014) it was held that a "nut product" made from vegetable fats for cooking, baking, and seasoning, although similar in size and color to creamery butter, was not an imitation of creamery butter within the prohibition of the Georgia statute. In this case the court reasoned that an "imitation" imported more than mere resemblance or similitude; rather that an "imitation" indicated something intentional instead of incidental. The court concluded that the primary purpose of the Georgia statute, and it should be noticed that the Alabama statute has a similar purpose, was not to protect other industries, but to protect the consumers from deception, injury, and fraud, resulting from the imposition upon the public of an article or product designed and intended to mislead or deceive. It was held that the "nut product," although similar to butter, had a distinct identity of its own and the mere fact that some consumers preferred to substitute it for butter did not constitute it an imitation of butter by the manufacturers within the meaning of the statute.

In the case of *Land O'Lakes Creamery v. McNutt*, (8th Circuit, 1943) 132 Fed. 2d. 653, it was held that oleomargarine is not "imitation butter" within the meaning of Title 21, Section 343, U. S. C. A., requiring the word "imitation" to be stamped upon the label of any food in imitation of another food. This recent case also held that oleomargarine is a well known food product with a distinct identity of its own, and although some persons may use it instead of butter, the fact that it was generally recognized as a separate and distinct product precluded it from the operation of the statute.

Upon the basis of the reasoning in the foregoing cases, it is my opinion that the sale of colored oleomargarine in the absence of an intention to defraud the public, or impose upon the public an unwholesome food, is not prohibited by any Alabama statute.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 20, 1944.

Hon. B. W. Simmons,

Circuit Solicitor, 22nd Judicial Circuit,

Covington County,

Andalusia, Alabama.

Court Reporters—Title 13, Section 263, Code of 1940.

There is no authority of law by which a court reporter can be paid for transcribing his stenographic notes taken on a preliminary trial of a felony case resulting in a mistrial.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of April 4, 1944, is as follows:

"Please advise if the State of Alabama, or any department or subdivision thereof, including a county, has authority to pay a court reporter for transcribing testimony taken on preliminary trial of a felony, and also testimony taken on trial of a felony case in the Circuit Court, the result of which was a mistrial, all on order of the Circuit Solicitor, and for his use.

"I note your opinion dated September 15, 1943, to Hon. B. P. Singleton, Chief Examiner of Public Accounts, Capitol, with respect to transcribing testimony taken in the Bessemer Division of the Circuit Court. This opinion apparently is based on law applicable only to Jefferson County."

In answer to your first inquiry, it is my opinion that there is no statute which authorizes the State of Alabama, or any department or subdivision thereof, including the county, to pay a court reporter for transcribing testimony taken on preliminary trial of a felony. The question of the authority of law to pay a court reporter for transcribing such testimony has been considered in several opinions of this office. Biennial Report of the Attorney General, 1928-1930, pp. 710, 1025; Quarterly Report of the Attorney General, Volume 2, p. 198. In each of these opinions it was held that there was no authority of law to pay a court reporter for taking testimony on a preliminary hearing.

The policy long adopted in this State is that public funds may not be expended, regardless of the benefits that might be derived from such expenditure, unless the authority for such expenditure is derived either from an express authorization of law, or by necessary implication.

The compensation allowed to court reporters is set out in Title 13, Section 262, 263, and 267, Code of Alabama 1940. There is nothing in these Sections that can be construed as expressly or impliedly authorizing the State of Alabama, or any department or subdivision thereof, including a county, to pay a court reporter for transcribing testimony taken on a preliminary trial of a felony.

It is my opinion that your second inquiry must also be answered in the negative.

Title 13, Section 263, Code of Alabama 1940, is as follows:

"§ 263. Transcript furnished to parties; fees for.—The court reporter shall furnish, within thirty days, or such other time as the judge may prescribe, to any party to a cause reported by him, upon demand being made for the same, or upon order of the presiding judge, a typewritten transcript of his stenographic notes or any part thereof except proceedings before the ground (sic) jury, upon payment of a transcript fee of ten cents for each one hundred words thereof, and for each carbon copy made at the same writing, five cents for each one hundred words thereof; but such court reporter shall not be required to perform any part of such service until the payment or security thereof is assured."

The original purpose of this Section was to require the court reporter to furnish a transcript of his stenographic notes in a case reported by him to the parties to the cause, in order to furnish said parties with all the testimony had upon the trial of the case, to aid in the preparation of the bill of exceptions on appeal, and to fix his compensation for such service. The reason for now requiring the court reporter to prepare the transcript in any case reported by him is that in perfecting an appeal of the case, such transcript is necessary to present the testimony and evidence had on the trial of the cause, and is in lieu of the "old bill of exceptions." General Acts of Alabama, Regular Session, 1943, page 423.

Except as otherwise provided by statute (Title 15, Section 369, Code of Alabama 1940, which authorizes appeals by the State in habeas corpus and capital bail cases, and Title 15, Section 370, which authorizes appeals by the State when statutes are declared unconstitutional in criminal cases, a consideration of which Sections is not necessary in the instant case), the State has no authority to appeal criminal cases. Because of this fact, there is no necessity for the State to obtain a transcript of the court reporter's stenographic notes, and no provision of law has been made for the payment of the cost of securing the same.

It follows that since no provision of law expressly or by necessary implication authorizes the State of Alabama, or any department or subdivision thereof, including a county, to pay a court reporter for transcribing testimony taken by him on the trial of a felony case in the circuit court, which resulted in a mistrial, the court reporter cannot be paid for such service.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 27, 1944.

Hon. E. T. Knight, Chairman,
Cullman County Board of Revenue,
Cullman, Alabama.

Constitution 1901 Section 215, Counties, Public Improvement Bonds.

Proceeds 2½ mill levy for public improvements under sub-division (a), Section 215, Constitution of Alabama 1901, may be used to retire bonds issued pursuant thereto, and such proceeds applied by resolution of County Governing Body where not pledged wholly to payment of any one bonded obligation.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of March 29, 1944, is as follows:

"At the present time the Board of Revenue levies the tax rates to be collected as follows:

"5 Mills for the General Fund 2½ Mills for Roads, Bridges, and Public Buildings and we have been breaking this down as follows:

"5 Mills for the General Fund 1 Mill to Provide a sinking Fund to retire \$100,000.00 Road Bonds; \$10,000.00 in bonds due each year with interest.

1 Mill to Provide a Sinking Fund to retire \$50,000.00 Hospital Construction Bonds, \$2,000.00 in bonds due each year with interest.

½ Mill to Provide a Sinking fund to retire \$36,000.00 Jail Construction Warrants, \$3,000.00 in bonds due each year with interest.

"Last year a special election was held to issue \$22,000.00 bonds in order to purchase public property to be used to build a courthouse or other public buildings as may be needed. So far we have been paying interest on these bonds out of the general fund but our general fund is in such a condition that it is working a hardship on the Board to pay this interest and the bonds of \$1,000.00 each as they come due, the first bond to come due on December 1, 1944 with interest on same.

"The one mill levied to provide a sinking fund to retire the \$50,000.00 Hospital Bonds as they come due is more than sufficient to take care of the Hospital Bonds as they come due and have been able to purchase \$40,000.00 in Government Bonds; this \$40,000.00 in Government Bonds in addition to taking care of the Hospital Bonds and interest as they come due. We are wondering if the Board has the authority to break down the

one mill levied for the purpose of providing a sinking fund to retire the \$50,000 Hospital Bonds as follows:

“ $\frac{1}{2}$ Mill to retire \$50,000.00 Hospital Bonds and

$\frac{1}{2}$ Mill to retire \$22,000.00 Purchase Public Property Bonds or breaking the entire tax levy down as follows:

5 Mills for the General Fund

1 Mill to Provide sinking fund to retire \$100,000 Road Bonds

$\frac{1}{2}$ Mill to provide sinking fund to retire \$50,000 Hospital Bonds

$\frac{1}{2}$ Mill to provide sinking fund to retire \$22,000 Purchase Public Property Bonds

$\frac{1}{2}$ Mill to provide a sinking fund to retire \$36,000 Jail Construction warrants.

“May we have your opinion on this matter at an early date?”

Receipt is also hereby acknowledged of No. 1, County of Cullman Hospital Bond and copy of extract of minutes of Governing Body of Cullman County recorded November 7, 1938.

Section 215 of the Constitution of Alabama, 1901, provides as follows:

“Sec. 215. No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, (a) **any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected.**”

An examination of the minutes of the meeting of November 7, 1938, of the Board of Finance and Control of Cullman County reveals the necessary legal procedure for the issuance of the hospital bonds has been formally accomplished and adopted by your County. Since there can be no doubt that a county hospital is a public building, there is no hesitancy in determining that the authorization of such an issue by the governing body conforms to the provisions of said Section 215, supra.

In order to further determine the question presented by your inquiry, viz: whether the one mill pledged by resolution, annually by Cullman County, for the retirement of hospital bonds can be broken down to permit payment of other general obligation bonds for public buildings in Cullman County from the proceeds thereof to consider the pledge as authorized by the Governing Body and recited in the face of the bond. This pledge appears in the face of the bond as follows:

"The indebtedness evidenced by this bond is a general obligation of the County for the payment of the principal of and interest on which the full faith, credit, resources and taxing powers of the County have been irrevocably pledged. The payment of the principal of and interest on the said issue of bonds of which this is one is further secured by a pledge of the one-fourth of one per centum ($\frac{1}{4}$ of 1%) ad valorem tax authorized under the provisions of Section 215 of the Constitution of Alabama to be levied and collected annually by the County for the payment of any debt or liability created for the erection of necessary public buildings, bridges or roads, to such extent as may be necessary to pay the principal of and interest on the said issue of bonds as and when the said principal and interest shall respectively mature."

The above pledge is in accordance with the provisions of the resolution authorizing said issue of bonds.

Thus it may be seen that since only so much of the $2\frac{1}{2}$ mills levied under sub-division (a), Section 215, supra, as is necessary for the retirement of the said \$55,000.00 hospital bond issue is pledged for the payment thereof the balance of the proceeds of such levy may be used in the retirement of any bonds sold under the provisions of said sub-division (a), Section 215, supra.

Therefore, it is the opinion of this office that it is within the authority vested in your governing body to provide $\frac{1}{2}$ mill of the $2\frac{1}{2}$ mill levy pursuant to provisions of Section 215, Constitution, toward a sinking fund to retire bonds issued for the purpose of construction or maintenance of necessary public buildings, namely: courthouse of Cullman County, Alabama.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 27, 1944.

Hon. Grady Boyd,
Clerk, Register,
Seventh Judicial Circuit,
Cleburne County,
Heflin, Alabama.

Sheriffs—Intoxicating Liquors—Mileage—Title 11, Section 100.
Code of 1940—Title 29, Sections 152, 237, Code of 1940.

1. Mileage allowed sheriffs in prohibition cases not limited to those cases involving five gallons or more of liquor.

2. Opinion rendered by this office to Hon. S. G. McVay, Sheriff, Clarke County, under date of September 15, 1927, Biennial Report of the Attorney General, 1926-28, page 282, hereby overruled.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of April 14, 1944, is as follows:

"The Sheriff of this county has requested me to collect mileage in cases of violating prohibition law regardless of the amount of liquor found. I was of the opinion that this mileage was collected only when 5 gals. or more was taken. Please give me your opinion on this law."

It is my opinion that the right of the Sheriff to receive the mileage provided for in the prohibition laws is not dependent upon, or affected by, the amount of liquor involved in the particular case.

Title 11, Section 100, Code of 1940 provides in pertinent part as follows:

"When a sheriff captures or arrests a defendant with contraband or prohibited liquors or beverages, either with or without a warrant, there shall be taxed in his favor against the defendant on conviction in addition to any other fees and charges now allowed by law, ten cents per mile each way from the courthouse to the place of arrest, and all expenses for the transportation of the contraband or prohibited liquors and beverages from the place of arrest to the courthouse."

Title 29, Section 152, Code of 1940, provides that the officer making the seizure under a writ in an injunction case for the abatement of a liquor nuisance shall be allowed the sum of ten cents per mile for every mile traveled in making the seizure.

Title 29, Section 237, Code of 1940, provides that an officer making the seizure of contraband liquor and vessels under a search warrant shall be allowed the sum of ten cents per mile for each mile traveled in executing the writ.

None of these statutes providing for mileage in certain prohibition cases conditioned the right to receive such mileage upon the amount of liquor involved in the particular case. Therefore, it is my opinion that those instances in which the Sheriff is entitled to mileage are not limited to cases in which five gallons or more of liquor are involved.

In an opinion of this office rendered to Hon. S. G. McVay, Sheriff, Clarke County, under date of September 15, 1927, Biennial Report of the Attorney General, 1926-28, page 282, it was held that the only instances in which a Sheriff may receive mileage are cases involving the seizure of liquor in vessels under a search warrant. The conclusion reached in this opinion is incorrect, and for this reason, is hereby expressly overruled.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 28, 1944.

Hon. R. F. Lyon, Treasurer.

Shelby County,

Columbiana, Alabama.

Sheriffs—Fees on preliminary hearings when defendant bound over, indictment found and defendant acquitted or nolle prosequi entered, may be collected from fine and forfeiture fund.

Fine and Forfeiture Fund—Sheriffs—Fees on preliminary hearings when defendant bound over, indictment found and defendant acquitted or nolle prosequi entered, may be collected from fine and forfeiture fund.

Costs and Fees—Sheriffs—Fees on preliminary hearings when defendant bound over, indictment found and defendant acquitted or nolle prosequi entered, may be collected from fine and forfeiture fund.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of March 20, 1944, is as follows:

"The Sheriff of this county has presented a bill of cost properly signed by himself and the presiding judge for certain claims from the Fine and Forfeiture Fund:

"Here are the facts in the case.

"Warrant, charging murder, was sworn out before a Justice of the Peace.

"Defendant was arrested and committed to jail.

"A Preliminary Hearing was held and the Defendant was bound over to the Grand Jury.

"The Grand Jury returned true bill, the indictment charging Second Degree Murder.

"Upon trial in Circuit Court, the Defendant was acquitted and discharged.

"The Sheriff's bill of cost made claims for

Arrest:	\$ 4.00
Guard Fee	2.00
Serving 19 State Witnesses.	9.50
Total	\$ 15.50

Questions:

"1. Should the arresting fee and the guard fee be reckoned as part of 'Preliminary Hearing' cost?

"2. If your opinion is affirmative, are these items of cost proper charges against the Fine and Forfeiture Fund?

"I am prompted to ask these questions because I am not sure the Sheriff acting in capacity of a constable together with the fact that a Justice Court is not a court of record can claim these fees in cases wherein the Defendant is acquitted or the case is nol-prossed."

It is my opinion that the guard fee and arrest fee enumerated above should be charged as part of the preliminary hearing and the items of cost enumerated in your inquiry are proper charges against the Fine and Forfeiture Fund of the county.

You are advised that when the defendant is bound over to the Grand Jury after a preliminary hearing, the fees to which the sheriff is entitled for performing duties during the preliminary hearing follow the case to the court in which the defendant is bound to appear.

In *Hawkins ex rel F. P. O'Brien v. The State*, 124 Ala. 102, page 105, it is stated:

"In all such cases, the costs arising on the preliminary trial before the justice, in case the defendant is bound over, follow the case into the court in which he is bound to appear, and is taxed at the end of the prosecution and collected as the statutes require."

Title 15, Section 393, Code of Alabama 1940 provides in part as follows:

"Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the county treasurer of such county must pay the fees of the officers of the court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, *** , or in cases in which the state enters a nolle prosequi, *** ."

You are further advised that even though the sheriff performs the duties of a constable, he is entitled to sheriff's fees as enumerated in Title 11, Section 100 of the 1940 Code. See **Trapp vs. State**, 122 Ala. 394, 25 So. 194.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 28, 1944.

Hon. E. P. Russell, Director,

Department of Corrections and Institutions,

Montgomery 4, Alabama.

Committing magistrates—City Recorders entitled to claim fees of Justice of the Peace for holding preliminary hearings. Title 37, Sections 585, 596. Title 11, Section 96.

Policemen—Municipal policemen not entitled to constable fees for services performed on preliminary hearings.

Convict Fund—Fees of City Recorders, acting as committing magistrates, payable out of Convict Fund. Title 45, Section 69. Title 45, Section 96.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of March 20, 1944, is as follows:

"Re: Court Costs

"Please give us an opinion on the following:

"1st. Has the Department of Corrections and Institutions the authority to pay any costs in City Recorders Court when defendant is sentenced to hard labor or penitentiary.

"2nd. If the above is answered in the affirmative, what items of costs are payable and to whom should the Circuit Clerk disburse same.

"3rd. We understand that a City Recorder, under Title 37, Section

585, 1940 Code, has the power of an ex-officio Justice of the Peace in criminal cases, and would like to know if the grant of power confers the right to claim the fees allowed a Justice of the Peace.

"4th. Would a city police officer be entitled to fees of a constable.

"5th. We are attaching a true copy of court cost bill from Mobile, Alabama, City Court; also a copy of court cost bill from Montgomery, Alabama, City Court showing the manner in which the two different cities are charging the department with costs."

(1) You are advised that the Department of Corrections and Institutions has the authority to pay certain costs in the City Recorder's Court out of the Convict Fund when the defendant is sentenced to hard labor or the penitentiary.

Title 45, Section 69, Code of Alabama 1940, provides when the defendant is convicted and sentenced to the penitentiary the "cost of committing magistrate and constables on preliminary trial, both together not to exceed five dollars" shall be paid out of the Convict Fund. Title 45, Section 96 provides that the same items of cost shall be paid when the sentence is hard labor for the county.

(2, 3, 4) As your inquiry states, Title 37, Section 585 provides that the City Recorder has the power in criminal matters of an ex-officio Justice of the Peace. Title 37, Section 596 provides that when the Recorder has reasonable cause to believe that a felony has been committed, he has authority to proceed in all respects in such cases as Justices of the Peace are required by law to proceed. It is my opinion that when a City Recorder holds a preliminary hearing and is sitting as a committing magistrate, as required by law, he is entitled to claim the costs of a committing magistrate as provided in Title 11, Section 96, Code of Alabama 1940. See opinion of this office dated August 10, 1934, addressed to Hon. John B. Scott, City Recorder, Montgomery, Alabama, stating that a city recorder is entitled to receive fees as a committing magistrate and that said fees are paid by the State of Alabama. Office Edition, Opinions of the Attorney General, July 1, 1934, September 30, 1934, Volume 18, Page 61. Therefore, when the City Recorder is acting as a committing magistrate he may claim the fees of a Justice of the Peace, as listed in Title 11, Section 96, and such fees may be paid from the Convict Fund, because the fee of the committing magistrate is provided for in Title 45, Sections 69 and 96.

It is further my opinion that a city police officer is not entitled to constable fees for the reason that a constable is an elected officer and may claim his fees only by virtue of the fact that he is a constable. A police officer, not being a constable, may not claim such fees. On the cost bill submitted to me, illustrating the method in which costs are being charged in the Circuit Court of Montgomery County, it does not appear whether the services were performed by a city policeman or by a constable or sheriff.

I shall not enumerate the costs that are payable to the committing magistrate, as those costs and fees are enumerated in Title 11, Section 96, Code of Alabama 1940. Of course, these costs are not payable at all unless the committing magistrate reduces to writing the evidence taken on trial. See Title 11, Section 84, Code of Alabama 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 1, 1944.

Hon. G. R. Swift,

State Highway Director,

Highway Department,

Montgomery 4, Alabama.

Highway Department—Highway Department authorized to repair streets in municipality when such streets are designated as connecting public highways. Title 23, Section 3, Code of Alabama 1940.

Highway Department—Authorized to construct, maintain and repair streets abutting educational institutions.

Highway Fund—May be used to maintain and repair streets when connecting public highways.

Convicts—Convict labor may be used in constructing and maintaining public roads. Title 23, Section 31, Code of Alabama 1940.

Highway Department—May repair streets of municipality and municipality may furnish materials.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of April 25, 1944, is as follows:

"Please advise us at your earliest convenience on the following matters:

"(1) Whether or not the State Highway Department may make repairs upon a road or roads passing through a municipality by using convict labor and State Highway Department machinery and equipment when the municipality agrees to furnish materials.

"(2) Whether the State Highway Department can build, construct or repair streets abutting State educational institutions.

"Please indicate whether or not the funds of the Highway Department may be used in these two instances."

(1) A complete answer to both of the above questions is found in Title 23, Section 3, Code of Alabama 1940. Before a road or street within the corporate limits of a municipality is constructed, repaired and maintained, such streets should be designated by the Director of the Highway Department as a street "which will serve to connect the State highway constructed or repaired by the Highway Department." As stated in Title 23, Section 3, the Highway Department is not only authorized to construct, repair and maintain such

streets connecting State highways, but it is also the duty of the Highway Department to designate the streets in municipalities connecting State highways and to construct, repair and maintain such connecting streets.

It is my opinion that since the State is authorized to construct, repair and maintain State roads, it may do so with the aid of a municipality that furnishes material.

Title 23, Section 31, Code of Alabama 1940, authorizes the Highway Department to use convict labor in constructing and maintaining the public road of Alabama.

(2) In connection with the paving or improving the street, highway or walkways abutting an educational institution of the State of Alabama, you are advised that when the State educational institution abuts on one side of the street, the State may pay out of Highway funds the cost of one-half of the construction or maintenance, but with the special approval of the Governor the State Highway Department may pay all of such expenses. If the State educational institution's property abuts both sides of such street or highway the State may pay the entire expenses for constructing and maintaining highways, walkways and driveways. The funds for the costs and expenses incurred in the project discussed in (1) and (2) above may be paid out of the State Highway funds in accordance with provisions of Title 23, Section 15, Code of Alabama 1940.

See Title 23, Section 3, Code of Alabama 1940, and Biennial Report of Attorney General, 1936-38, page 786.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 4, 1944.

Hon. J. H. Green,
Clerk Circuit Court,
Morgan County,
Decatur, Alabama.

Statutes—Department of Public Safety—Rules of the Road—Solicitors—Costs and Fees—Title 36, Section 31, Code of 1940—Title 11, Section 85, Code of 1940—Act No. 558, General Acts of Alabama 1943, p. 548.

1. Act No. 558, General Acts of Alabama 1943, page 548, repealed by implication—Title 36, Section 31, Code of 1940.
2. Solicitor's fee in conviction for violation of said Act No. 558 is \$10.00.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of April 5, 1944, is as follows:

"Will you please give me your official opinion as to whether the Act passed by our last Legislature at its regular session in 1943, No. 558, and found in said Acts at page 548, repeals Section 31 of Title 36 of the Code of 1940?

"I am of the opinion that if said Act repeals the said Code section, then the Solicitor's fee should be \$10.00 in place of \$30.00. I would also be glad for you to give me your opinion as to the proper Solicitor fee to be charged for the conviction under said Act."

In answer to your first inquiry, it is my opinion that Act No. 558, General Acts of Alabama 1943, p. 548, effects a repeal of Title 36, Section 31, Code of Alabama 1940.

Said Act No. 558, in Section 2 thereof, imposes upon the driver of any motor vehicle involved in an accident resulting in injury to or death of any person, or damage to another vehicle, the duty to stop immediately at the scene of such accident. A failure to so stop is made a misdemeanor punishable by a fine of not more than \$500.00, and imprisonment in the county jail for not more than thirty days.

The remaining sections of said Act No. 558 place upon such persons certain duties as to the rendering of assistance, the giving of information, and the filing of written reports of such accidents with the Director of Public Safety. However, no penalty is provided for the failure to perform such duties.

The said Act No. 558 does not expressly repeal Title 36, Section 31, Code of Alabama 1940, nor is there any general repealing clause contained therein. Therefore, any repeal can be by implication alone.

The Supreme Court of Alabama has consistently held that repeal of a statute by implication is not favored, and that, if practicable, two statutes on the same subject matter will be construed together in an effort to give effect to each. However, where the new statute covers the entire subject matter of the former statute and is irreconcilable with it, and evidently intended to supersede and take the place of the former statute, it repeals such former statute by implication. (*Allgood v. Sloss-Sheffield Steel and Iron Co.*, 196 Ala. 500, 71 So. 724; *Davis v. Browder*, 231 Ala. 332, 165 So. 89.)

It is my opinion that the said Act No. 558 is repugnant to and irreconcilable with Title 36, Section 31, Code of 1940. The said Section 31 makes it a felony for the driver of any vehicle involved in an accident to fail to stop such vehicle at the scene of the accident. It is also made a felony for such driver to refuse to give his name, address and automobile license number, or to render assistance to injured persons. The said Act No. 558, by imposing not only the same duties, but additional duties, such as the requirement of filing a report of the accident, is obviously intended to cover the entire subject matter formerly treated in the said Section 31, thereby superseding it. Furthermore, there is an irreconcilable conflict between Section 31, making a violation thereof a felony, and Act No. 558, making the failure to stop at the scene of an accident a misdemeanor, but imposing no penalty for the violation of the other provisions of said Act. Therefore, it is my opinion that Act 558, being a later expression of the Legislature, repeals Title 36, Section 31, of the Code of 1940.

In answer to your second inquiry, it is my opinion that the solicitor's fee which should be taxed as part of the costs in a conviction under the said Act No. 558, not being specifically provided for therein, is, under the provisions of Title 11, Section 85, Code of 1940, \$10.00. This statute provides that the solicitor's fee for each conviction of a misdemeanor not otherwise provided for shall be \$10.00. Inasmuch as the violation of Section 2 of Act No. 558 is made a misdemeanor, this section is applicable.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 8, 1944.

Hon. E. W. Gunn, Administrator,

Alabama Alcoholic Beverage Control Board,

Montgomery 2, Alabama.

Alabama Beverage Control Board—Importation of alcoholic beverages—Licenses—Title 29, Section 66, Code of Alabama 1940—

Title 29, Section 66, Code of Alabama 1940, applies only to licensees of the Alcoholic Beverage Control Board—

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of April 27, 1944, is as follows:

"We request that you give us your official opinion as to whether or not Section 66 of Title 29, Code of Alabama 1940, which is Section 49 of the Alabama Beverage Control Act (Acts of Alabama Extra Session 1936-37, Act 66, page 40) applies only to the licensees of this Board, or to other parties."

It is my opinion that Title 29, Section 66, Code of Alabama 1940, which section appeared as Section 49 of the Alabama Beverage Control Act (Acts of Alabama, Extra Session, 1936-37, p. 40) applies only to licensees of the Alabama Beverage Control Board.

This conclusion is based upon the case of **Hardin v. State**, 241 Ala. 4, 3 So. 2d 89, in which the Supreme Court of Alabama, in dealing directly with this question, said as follows:

"Interpreting the provisions of § 49 of the Act, in the light of these other provisions noted above, it is our conclusion that said section refers to licensees of the Board, and gives such licensees three days from the receipt of goods which they are authorized by license to possess, transport or sell, to report the same for taxation, and penalize such licensees for the failure to so report.

"Said section is not applicable to persons not licensees who bring into the State untaxed liquors or beverages. Under the facts the defendant if guilty at all is guilty of violating the provisions of the last clause of § 51 quoted above, which makes it a misdemeanor to import into the State, without authority of the Board, untaxed liquors and beverages."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 9, 1944.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Department of Finance,

Montgomery 4, Alabama.

Court of County Commissioners—Counties—Title 15, Section 428,
Code of 1940.

1. The governing body of a county is without authority to pay the expense incurred in having an examination of a defendant made by a physician under an order of the judge of a court of record made under the provisions of Title 15, Section 428, Code of 1940.

2. Such expense may be paid from the Governor's Contingent Fund, or the Governor's Emergency Fund. However, it is in the discretion of the Governor as to whether or not such expense will be paid from said funds.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of May 2, 1944, is as follows:

"Please advise me in regard to the following:

"In any court of record, where the presiding judge, under authority of Section 428, Title 15, of the 1940 Code, orders a sanity hearing for a defendant, does a county governing body have authority to pay expenses of such examination of defendant by physician or physicians ordered by the court to conduct such examination? If so, where is such authority found?

"If a county is not authorized to pay such claim, is the Attorney General's opinion, Volume 27, page 55, in which it was held a county had no authority to pay claim of physician ordered by the trial judge to examine a witness who claimed to be ill and too sick to attend court, applicable in this case?

"If a county is not authorized to pay, is there any other provision made for payment of such services? The latter question is asked, due to the fact we have knowledge of a similar case in which such payment was effected from the Governor's Contingent Fund."

It is my opinion that the governing body of a county is without authority to pay the expense incurred in having an examination of a defendant made by a physician under an order of the judge of a court of record made under the provisions of Title 15, Section 428, Code of Alabama 1940.

The policy long adopted in this State is that public funds may not be expended, regardless of the benefits that might be derived from such expenditure, unless the authority for such expenditure is derived from an express authorization of law, or by necessary implication. Before the governing body of a county may expend any county funds, it must point to some statute authorizing such expenditure. **Ensley Motor Co. v. O'Rear**, 196 Ala. 481, 71 So. 764; **Bice, County Treasurer v. Foshee**, 19 Ala. App. 421, 97 So. 764; Quarterly Report of the Attorney General, Volume 16, page 198; Quarterly Report of the Attorney General, Volume 18, page 325.

I can find no statute which expressly or by necessary implication authorizes the governing body of a county to expend county funds for the payment of the service of a physician in making an examination of a defendant ordered under the provisions of Section 428, *supra*.

While the question under consideration in the opinion rendered to the Board of Revenue of Barbour County under date of May 1, 1942, Quarterly Report of the Attorney General, Volume 27, page 55, and referred to in your request, is somewhat different from the question now under consideration, the principle of law on which this opinion is based is applicable to the question presented by your inquiry.

Section 428, *supra*, makes no provision for the payment of the expense incurred in having an examination of a defendant made by a physician, nor is there any provision made for the payment of such expense by any other statute.

Such expense may be paid from the Governor's Contingent Fund, or the Governor's Emergency Fund. However, it is in the discretion of the Governor as to whether or not such expense will be paid from said funds.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 15, 1944.

Hon. O. L. Andrews,

Clerk Circuit Court,

Tenth Judicial Circuit of Alabama,

Jefferson County,

Birmingham, Alabama.

Circuit Courts—Rules—Code 1940, Tit. 13, §§ 126 (6), 162; Tit. 7, § 291.

Circuit Court may by rule require complaints filed therein to be endorsed with plaintiff's correct residence address, and in default of such endorsement direct Circuit Clerk not to accept or receive such complaints.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of May 11, 1944, is as follows:

"Please give us your opinion as to whether or not the Clerk of the Circuit Court would be bound by the following Rule of Court to refuse to accept a complaint which does not have the residence address of the Plaintiff endorsed on the back of said complaint.

"Rule 41. "Before filing a complaint, the plaintiff therein or his counsel shall endorse on the back thereof, the correct residence address of the plaintiff. The Clerk is directed not to accept or receive a complaint which is not so endorsed. This Rule shall become effective August 1, 1943."

"This rule was not called to the attention of the Clerk at the time of its adoption, therefore it has not been complied with to date.

"Please render your opinion at your earliest convenience."

I am of opinion that the rule above quoted is a valid exercise of the inherent power of the Circuit Court to make and promulgate such reasonable rules and regulations as it deems necessary or helpful to expedite the administration of justice and facilitate the transaction of its business. 14 Am. Jur.—Courts—p. 355, §§ 150, 151.

Such inherent power is recognized in Alabama and declared also by statute. Code 1940, Tit. 13, §§ 126(6), 162; Tit. 7, § 291; *Smith v. L. & N. R. Co.*, 219 Ala. 676, 123 So. 57; *Brown v. McKnight*, 216 Ala. 660, 661, 114 So. 40.

In the absence of any showing that the rule in question is unreasonable or in conflict with any constitutional or statutory provision of law, its validity cannot be questioned, and as Circuit Clerk you are bound thereby.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 15, 1944.

Hon. G. H. Howard,

Judge of Probate,

Elmore County,

Wetumpka, Alabama.

Constitutional Law—Statute, relieving public officials of liability after paying out or receiving funds under general or special act, subsequently declared unconstitutional, enacted to relieve for bona fide mistake of law. Title 41, Section 58, Code of Alabama 1940.

Elmore County—Local Act of 1927, page 377, setting per diem and mileage for members of Court of County Commissioners at a different rate than that prescribed by general law is unconstitutional violating Section 96 of Constitution of 1901.

Title 41, Section 58, Code of Alabama 1940—Construed to relieve of liability for bona fide mistake of constitutionality of law.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of March 17, 1944, is as follows:

"Please advise me your opinion on the following.

"In 1927 a local law for Elmore County was passed, see page 377 local laws 1927, providing pay for Commissioners of Elmore County of \$5.00 per diem and 7 cents per mile traveling expense. In Elmore County the Probate Judge is Chairman of the Commissioners' Court. Does this local law have the same application to the Chairman of the Court as to the other members regarding per diem. It is understood of course that the general law at that time provided a different compensation for Commissioners and that should the local law above mentioned be directly attacked in the Supreme Court it would be declared unconstitutional. On the other hand a general law provides that State Examiners of Accounts shall not charge back to an official any amounts paid to him under a local law until that law is declared unconstitutional by the Supreme Court. If the Probate Judge of Elmore County be paid the \$5.00 per diem for serving as Chairman at meetings of the Court, would the above named general law preventing examiners from charging back under local laws have the same application to him as it does to other members of the Court?"

It is my opinion that your inquiry cannot be answered with a categorical yes or no. You are advised, however, that Title 41, Section 58, Code of Alabama 1940 was enacted to prevent liability of a State or county official paying money under a bona fide mistake of law, namely, a general or special law

declared unconstitutional by the Supreme Court after payment has been made.

Section 96 of the Constitution of 1901 provides:

"The Legislature shall not enact any law not applicable to all the counties in the State, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

At the time of the passage of the local act fixing the compensation of the Court of County Commissioners of Elmore County at five dollars per day and allowing seven cents per mile mileage, the general law provided for the compensation of members of the Court of County Commissioners in a different amount, namely, three dollars per day and five cents per mile. Local Acts of 1927, page 377. Code of 1923, Section 6771.

The Supreme Court, in the case of **Carnley vs. Moore**, 218 Ala. 274, 118 So. 409, decided that a local law dividing a county into commissioner's districts and providing for compensation different from that provided for in the general law was unconstitutional and void, being in violation of Section 96 of the Constitution, since the purpose of this section of the Constitution is "to secure uniformity throughout the State as to costs and charges of court, fees, commissions, percentages and allowances of public officers. Like charges for like services rendered." **Morgan County v. Edmondson**, 238 Ala. 522, 192 So. 274.

It follows from the reasoning in the case of **Carnley v. Moore**, supra, that in all probability the local act here considered is unconstitutional and void in that it violates Section 96, Constitution of 1901.

Your attention is again called to Section 58, Title 41, Code of Alabama 1940, which reads as follows:

"Sec. 58. Officer paying and person receiving money paid under void law, not liable therefor.—When any state or county official shall have collected or paid out any money, as fees, salary or compensation for official services rendered under any law of Alabama, general or special, which law, subsequent to such collection or paying out, shall be declared by the supreme court of Alabama to be unconstitutional or void or illegal, such officer shall not be liable, either individually or on his official bond, in any suit brought for the recovery of such money, so collected, or paid out, nor shall the person to whom the same shall have been paid, be liable therefor."

It will be noted from the above section that any officer or official of the State of Alabama, or any county thereof, who pays out any fees, salary or compensation for official services rendered under any law of Alabama, shall not be charged back for such payment until the act under which the payment is made has been declared unconstitutional by the Supreme Court of Alabama.

It is not the prerogative of this office to adjudicate an act unconstitutional, but the duty of the Attorney General is merely to advise county officials as to his opinion as to the constitutionality or unconstitutionality of acts.

It is therefore my opinion that if you desire to follow the provisions of the local act here considered you will be protected in the paying out of any monies until the act is declared unconstitutional by the Supreme Court of Alabama.

In the opinion rendered to you under date of May 15, 1944, wherein this same act was considered, I am now convinced that certain parts of said opinion

were made in error. It was stated in the former opinion rendered to you that when the Attorney General declared an act unconstitutional then the examiners of accounts should from that date charge back any payment made under a local act. The Attorney General by his opinion cannot abridge the provision of Section 58 of Title 41, supra, and I therefore ask that the opinion under date of May 15, 1944, rendered to you on this subject be returned to me and that this opinion be substituted in its stead.

In conclusion, it is to be noted that although the members of the Court of County Commissioners of Elmore County are elected from separate commissioner's districts, Local Acts 1915, page 737, this is not sufficient to bring your statement of facts within the ruling of *Morgan County vs. Edmondson*, supra, also that the Judge of Probate is in fact and in law a member of the Court of County Commissioners. Reports of Attorney General, 1928-1930, page 709. The laws applicable to the members of the Court of County Commissioners, so far as the matters in this opinion are concerned, apply equally to the Probate Judge acting as a commissioner.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 15, 1944.

Hon. O. E. Cole, Chairman,

The County Commission of Russell County,

Phenix City, Alabama.

EMINENT DOMAIN

CONDEMNATION PROCEEDINGS

**LIABILITY FOR TAKING PROPERTY WITHOUT RESORTING
TO CONDEMNATION LAW.**

1. Where county institutes proceedings to condemn under the statute in 1936, and proceeds to the point, and no further, of filing of the commissioners' report finding the amount of just compensation in the same year but before and without the affirmance of the report and an order of condemnation made thereon the county abandons the condemnation suit and enters upon the land sought without the consent of the owners and erects a courthouse thereon and maintains the same until 1944, the condemnation suit is thereby discontinued.

2. Where the county takes possession of the land and erects a courthouse thereon without the consent of the owner and not under condemnation proceedings such taking is illegal and renders the county liable for just compensation at the suit of the owner.

3. The owners may recover just compensation by an action at law or by a suit in equity.

4. Where suit is simply for recovery of damages for the unlawful taking the owner is barred from recovery unless he files or presents to the county governing body a claim therefor within twelve months from the unlawful entry on the land, and he must in any event commence suit for such damages within six years from the date of the unlawful entry by the county.

5. If the owner seeks injunctive relief against the county it is not necessary to present the claim to the county.

6. Where the owner seeks only to recover just compensation he may have injunctive relief pending the proceedings to ascertain the just amount.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of April 17, 1944, is as follows:

"In 1936 Russell County instituted condemnation proceedings against various property owners for the purpose of acquiring title to the site for the erection of the Courthouse. Russell County apparently acquired title, by vote of the people issued bonds, and said Courthouse was erected. The Judge of Probate, by his decree of condemnation, appointed three commissioners to assess the damages, which was done by said commissioners and said commissioners did render their report in writing on the 13th day of March 1936, and from said commissioners' report, we quote the following:

"The undersigned further report unto the Court that in fixing and determining the damages or compensation to which the several owners or other persons interested therein, in the lands and improvements thereon, were entitled to receive by virtue of the taking of the same for said public use. *** EXCEPT the balance due upon assessments for public improvements made by the City of Phenix City against the several tracts or parcels of land hereinabove described, and Russell County will have to make complete settlement with the City of Phenix City for said balance due on said public improvement assessments."

"The assessments were for street improvement and there is nothing in the file or on the docket of the Probate Judge of Russell County showing a confirmation by said Judge of the report of said Commissioners in said cause and from aught that appears, said cause is still pending. Russell County has never paid any Court costs and neither has the Probate Judge filed his claim for the payment of said costs.

"As Chairman of the County Commission of Russell County, I am asking you to render me an official opinion, at your very earliest convenience, on the following:

"1. Is Russell County due the City of Phenix City the sum of \$1373.91 for said improvements, in view of the above statement?

"2. Can Russell County legally pay the Court costs on said proceedings to the Probate Judge of Russell County, in view of the condition of the file or the absence of the decree in said cause?

"3. Can the records of the Probate Court, after the period of eight years, be amended nunc pro tunc, i.e., to confirm said decree and tax Russell County with the costs without the Probate Judge having filed his claim for said costs within twelve months after said condemnation proceedings?

"4. I am enclosing herein a copy of said claim filed by Phenix City, Alabama.

"5. Can the Probate Court, in condemning lands for public improvements, make an exception in its decree or orders regarding outstanding liens? Or does it not have to divest the whole title and invest that title into the County? Can said Court do it by piece meals, as was attempted in this proceeding?

"6. Where a previous administration of County Commissioners pay a part of a paving claim without any contract on the minutes and without a claim being filed within twelve months as required by statute, can said claim be legally paid after a lapse of six years, by the County Commission of Russell County to the City of Phenix City, Alabama?

"A great number of these bonds were outstanding and it is very apparent that both the interest of the public and the bond holders will be affected, we think, by this hiatus in the proceeding by the Probate Court, hence this request."

Your six questions and the statement of facts incorporated in your letter involve many and quite intricate questions of law. We are not furnished with an adequate statement of all the facts so as to make specific answers to some of the points involved. We do not comprehend what you mean by "Russell County apparently acquired title by vote of the people." We know of no law authorizing a county to acquire a title to private property of an individual by a vote of the people. Sections 23 and 235 of our Constitution repudiate this suggestion. These constitutional provisions recognize the inherent right of the sovereign to take property for public use but they inhibit the exercise of such a right until the owner of the property is paid just compensation therefor. The legislature has prescribed the method of taking such property for such purposes and the ascertainment and payment of just compensation for the property taken or damaged.

At the time the proceedings in this case were instituted the law governing the subject was in Code 1923, Sections 7476 et sequi. The subject, so far as this case is concerned, is now treated in Code 1940, Title 19, Sections 1 et sequi.

We have now reached a point where Russell County sought to condemn property on which to erect a courthouse confessedly for public purposes. The county sometime in 1936 instituted condemnation proceedings to acquire the possession and use of private property on which to erect a courthouse for the

county. We are cited to no local act of the legislature, nor have we been able to find any under which the condemnation proceedings were instituted, so we presume the county authorities undertook to acquire the rights under the provisions above cited. The first steps require the condemning party to file with the probate judge of the county an application in writing describing the land sought to be taken etc. Code, Title 19, Sections 1 and 3. Whereupon the court makes and enters an order appointing a day for hearing the application and issues notice to the owner of the land and persons holding any right, title, or interest in the lands. Code, Title 19, Section 4. On the day appointed the court hears the parties and evidence thereon and makes an order granting or refusing the application. If the application be granted the court must appoint commissioners to ascertain the damages and compensation to which the owners or interested parties are entitled and the commissioners hear the parties and evidence thereon and make a report to the court of the commission's findings. When they do this the court **must** order the report recorded and **must** make an order of condemnation upon the payment of the damages or compensation so found and assessed by the report. Code, Title 19, Sections 4, 7, 11, 12, 13, and 16.

It affirmatively appears from your letter that the proceedings stopped and ended on the filing of the report by the commissioners with the probate judge. No judgment was made on this report condemning the property. No payment has ever been made to the owners. Instead of following up these proceedings it affirmatively appears that the county abandoned them and proceeded to enter upon the land erect a courthouse thereon, independent of and proceedings and it paid nothing, promised nothing and it said nothing. It was absolutely necessary that the court make an order of condemnation on the report of the commission and ordering the payment of the damages and compensation in order to vest any legal rights in the county.

The county's acts in taking possession and erecting a courthouse on the lands put it in the same position as it would have been had it never instituted the proceedings for condemnation. In my opinion the conduct of the county amounted to an abandonment of the proceedings and the same were in law discontinued, thereby divesting authority in the probate judge to make any further order in the matter, and none were ever made.

— The question as to when a cause is discontinued and what acts constitute a discontinuance in law has been many times passed upon by the courts, and defined by legal writers. We have been unable to find a case on all fours with the proceedings now being reviewed, but the case is controlled by the general principles announced by the courts and authorities. It is well stated that discontinuance is an interruption in the proceedings of a case caused by the failure of the plaintiff to continue the suit regularly as he should **or to follow up his case.**

It is in substance and legal effect an abandonment by the moving party of his pending case. 27 C. J. S. pages 156, 157; 2nd Stand. Enc. of Procedure, pages 651-652; 12 Words and Phrases (Permanent Edition) page 557.

Our court has substantially announced the same principle. **Ex Parte Humes**, 30 So. 732, 733, 130 Ala. 201; **Smith v. State**, 43 So. 129, 130, 149 Ala. 53.

Discontinuance, of course, must come from the acts and omissions of the party instituting the suit and failure of the probate judge to make the required orders, standing alone, is not binding on the plaintiff, nor does it constitute a discontinuance of the cause. The record shown by your letter is an impressive example of a case being discontinued by the acts of the party instituting the proceeding. The county ignored the proceedings and then actively pursued its own illegal course and took the lands, appropriated then, constructed the courthouse thereon, and has held possession for some eight years and has made no payments nor offered to make any, nor taken any proceedings to validate its illegal conduct.

This failure of the county to take the property under the law of eminent domain as provided by statute renders the county, under well established principles of law, liable. The owner of the land or interested parties therein were entitled to recover just compensation for the property taken and the damages sustained.

First, by a simple action at law. **Highland-Avenue B. R. Co. v. Mathews**, 99 Ala. 24, 10 So. 267.

Second, they could have maintained bill in equity to have the court ascertain just compensation.

Third, they could have maintained a bill in equity to have the court ascertain just compensation and have injunctive relief in such case pending the ascertainment of just compensation.

Fourth, They could maintained a suit in equity to enjoin the taking of the property and construction of the courthouse thereon. If the enforcement of this relief appears to the court to be impracticable or unjust then the court has the power to so mold its decree so as to award damages (just compensation) in lieu of the injunctive relief. **Tombigbee Valley Rr. V. Loper**, 184 Ala. 343; **City of Birmingham v. Smyre**, 230 Ala. 234; **Mobile County v. Barnes-Creary Supply Co.**, 225 Ala. 127.

Under some conditions the owner of the property may maintain ejectment, but in this case the apparent acquiescence of the owner would defeat an action of ejectment after the county expresses a willingness to pay just compensation. **Tombigbee Valley Rr. Co. v. Loper**, 184 Ala. 343.

Since no suits have been commenced covering the period of some eight years other principles of law may bar some of these remedies.

There is a statute that requires claims against the county to be presented to it within twelve months after the time of the accrual of the claim. That is to say, the date it is due. Code, Title 12, Sections 115, 118.

This statute does not apply to claims where the amounts due are fixed by law. But this statute does apply to claims against the county for unlawful taking of the owner's real property where recovery is sought in a suit at law. Each suit would be barred although the claim was duly filed unless it was commenced within six years after the entry and taking of the property by the

county. Code, Title 7, Sections 18 and 21. It is my opinion that the statute as to filing claims against the county and sections 18 and 21 cited above apply to a simple suit in equity to ascertain and fix reasonable compensation.

In a suit to enjoin the county from taking or constructing the courthouse thereon or in a suit to have a court of equity ascertain just compensation for the taking and to restrain the county, pending the ascertainment of damages, the statute requiring the filing of the claim with the county does not apply. **Mobile County v. Barnes-Creary Supply Co.**, 225 Ala. 127.

From the statutes and authorities cited, it is my opinion that Title 7, Sections 18 and 21 are applicable to the named suits in equity. From the foregoing it appears that we have answered your questions, but it may be well to deal more specifically with questions 1 and 2.

Your letter indicates that Phenix City is in the hands of the court, and we are not informed as to character of the case in court.

As to question two, the cause was never completed, but was discontinued. It is our opinion that in such case there is no authority to tax costs in such case, in fact, there is no judgment and no judgment for costs. The liability of the county to the parties performing duties under the proceedings attempted presents another question not here calling for an answer.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 18, 1944.

Hon. Ben P. Singleton

Chief Examiner of Public Accounts

Department of Finance

Montgomery 4, Alabama

Justices of the Peace—Costs and Fees—County Courts—Fine and Forfeiture Fund—Title 11, Section 97—Title 15, Section 393, Code 1940.

Justice of the peace entitled to a fee of twenty-five cents for acknowledging complaint and fifty cents for issuing warrants returnable to county court even though the case is nol-prossed or the defendant found not guilty, or the case abated by death of the defendant, and such fees are payable from the fine and forfeiture fund of the County.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of May 8, 1944, is as follows:

“Re: Justice of the Peace Claims against County Fine and Forfeiture Fund for taking affidavit and issuing warrant of arrest returnable to the County Court.

“Sometimes since January 16, 1943, you addressed an unofficial opinion to Hon. J. N. Pollard, Justice of the Peace, Luverne, Alabama, as follows:

“‘Dear Sir:

“‘I have your letter of January 16, 1943, in which you request my advice as follows:

““In connection with the Register's office I have served as Justice of the Peace for a number of years. I would like to have your opinion if it is possible to get it as to whether or not the Justice of the Peace is entitled to fees to be charged against the Fine and Forfeiture Fund for Taking the affidavit and issuing the warrant of arrest returnable to the County Court.

““In the opinion of the Attorney General, Jan. to March 1937, he holds that the Justice of the Peace is entitled to these fees to be collected as other fees and as I construe the law on failure to convict or nol pross the charge is just against the Fine and Forfeiture Fund of the County.

““In order to get this matter straight I would like your opinion on the matter.”

"The Opinion I presume you refer to is the one found in Quarterly Report of the Attorney General, Vol. VI, page 59. This opinion seems to me to answer your request fully. Where complaint is sworn out before a Justice of the Peace in a misdemeanor case of which the Justice has no final jurisdiction and such Justice makes it returnable to the County Court and there the defendant is acquitted, the case nol prossed or abated by death of the defendant, the Justice would be entitled to his fee for affidavit and warrant out of the fine and forfeiture fund of the county for the reason the Justice Court never assumes jurisdiction of the defendant or the subject matter but such jurisdiction was, by the issuance of the warrant of arrest, conferred on the County Court. Therefore, all the cost of the case accruing in the County Court including issuance of affidavit and warrant under the conditions above stated, would be payable out of the fine and forfeiture fund.

"Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

By JOHN J. HAYNES,

Assistant Attorney General.'

"The opinion to which you referred in the above letter on page 59 of Volume 6, Quarterly Report, has been generally construed to mean that the Justice of the Peace, under the conditions questioned, could go to his Insolvent Fund for the cost involved in taking the affidavit and issuing the warrant. This general construction, through the years, was found borne out by the opinion of your office on page 66, Volume 14, Quarterly Report.

"Inasumch as we are constantly confronted with this matter, I would very much appreciate your rendering me an official opinion on the following question:

"Is a Justice of the Peace entitled to collect from the County Fine and Forfeiture Fund his fees for taking affidavit and issuing warrant of arrest, returnable to the County Court, upon the acquittal of the defendant or the case being nol prossed or abated by death?"

It is my opinion that a justice of the peace is entitled to a fee of twenty-five cents for acknowledging complaints and fifty cents for issuing warrants returnable to the county court even though the case is nol-prossed or the defendant found not guilty, or the case abated by his death, and that such fees are payable from the fine and forfeiture fund of the county.

In an opinion rendered by this office to Hon. R. L. Mosley, Clerk of the Circuit Court, Fayette County, under date of February 3, 1937, Quarterly Report of the Attorney General, Volume 6, page 59, it was held that justices of the peace were entitled to a fee of twenty-five cents for acknowledging complaints and fifty cents for issuing warrants returnable to the county court to be collected like other costs, even though the case is nol-prossed or the defendant found not guilty.

This opinion was based on a construction of Section 3754, Code of Alabama of 1923, which Section now appears as Title 11, Section 97, Code of 1940. This Section provides that the fees accruing to the justice of the peace in the proceeding must be certified by him to the court "to which the process is returnable, and there taxed and collected like other costs."

In the instant case "other costs" accruing in the county court are payable from the fine and forfeiture fund of the county under the provisions of Title 15, Section 393, Code of 1940. Since the fees of the justice of the peace are by Title 11, Section 97, payable as other costs incurred in criminal cases, they are by virtue of Title 15, Section 393, Code of 1940, payable from the fine and forfeiture fund of the county.

In an opinion rendered by this office to Hon. W. C. Bragg, County Treasurer, Fayette County, under date of January 30, 1939, Quarterly Report of the Attorney General, Volume 14, page 66 (the opinion referred to in your request), a contrary conclusion was reached. This opinion was based on the case of *Hawkins, ex rel., etc. v. State*, 124 Ala. 102, which case dealt only with fees of a justice of the peace on preliminary hearing, and is not authority for the proposition for which it was cited. It is my opinion that the conclusion reached in this opinion is not correct and the same is hereby overruled.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 19, 1944.

Mrs. Edwina Mitchell, Associate Member

Board of Pardons and Paroles

Montgomery 5, Alabama

Pardons and Paroles—Board of Pardons and Paroles.

1. Where a person was convicted and sentenced, and thereafter granted a temporary parole, after affirmance upon appeal, and failed to surrender himself for execution of the sentence, upon expiration of the parole, before the creation of the Board of Pardons and Paroles, his status is that of an escaped convict, and said Board is without jurisdiction over him.

2. In such case such escaped convict is subject to arrest by order of the court wherein sentence was pronounced.

Opinion by Assistant Attorney General Matthews.

Dear Madam:

Your request for an official opinion, bearing date of May 12, 1944, is as follows:

"In re: Robert Ward

"We shall appreciate an opinion from you on the status of the above-named subject and as to responsibility under the following facts:

"Mr. Ward was convicted in Madison County of the offense of arson on November 24, 1936. He took an appeal, which was finally affirmed on January 3, 1938. On January 14, 1938, before the defendant surrendered to the Sheriff of Madison County for the execution of his sentence, the Governor of Alabama issued a temporary parole of ninety days. On March 15, 1938, the Governor denied Mr. Ward's petition for permanent parole. Mr. Ward has never been arrested and has never surrendered for the execution of his sentence.

"The Director of the Department of Corrections and Institutions states that he has no responsibility inasmuch as Mr. Ward has never been in the custody of that Department.

"We should like to be advised who has any duty in the premises."

At the time the aforementioned parole was granted Code 1923, §§ 5132, 5133 were in effect, and upon expiration of the term of said parole and failure of the parolee to surrender himself for execution of the sentence theretofore imposed upon him the Governor was authorized under Section 5133 to direct his arrest and return to custody.

Whether any such order was made and entered "upon the record kept under Section 5127" of the Code of 1923 does not appear. If such order was in fact made then no doubt it should be executed.

Upon expiration of the parole and violation thereof by failure of the parolee to surrender for execution of the sentence his status changed to that of escaped convict, and thereupon he was, and continues to be, subject to arrest. Thenceforth he had the status of "a felon, at large by the mere grace of the Executive, and not entitled to be at large after he has breached the conditions upon which that grace was extended to him." **Fuller v. State**, 122 Ala. 32, 40, 26 So. 146.

The effect of the appeal and, after its affirmance, of the parole granted within the fifteen days allowed the convict to surrender for execution of his sentence, was merely to suspend or postpone execution of the sentence, and not to annul its execution, even though the convict remained at large until after expiration of the term, within which he might have finished serving his sentence. **Fuller's case, supra**.

Inasmuch as this convict was not under parole at the time the Board of Pardons and Paroles was created, the doctrine announced in **Pinkerton v. State**, 29 Ala. App. 472, 198 So. 157 (1940) is without application and said Board is without jurisdiction over said convict.

As said in 15 **Am. Jur. Criminal Law**, p. 161, § 512.

"A convicted defendant who is at liberty and has not served his sentence, in the absence of a statute to the contrary, may be arrested, as

for an escape, and ordered into custody on the unexecuted judgment. The result is the same if he escapes to another jurisdiction and is brought back, though by illegal means."

See also 15 Am. Jr. p. 147, § 496.

I am of opinion that it is competent for the court wherein this convict was sentenced to order his arrest for execution of the sentence therein heretofore pronounced.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 19, 1944.

Hon. B. G. Farmer, Sheriff

Houston County

Dothan, Alabama

Fine and Forfeiture Fund—Funds—Costs and Fees—Preliminary hearings—Corrections & Institutions—Sheriffs—Clerks—Witnesses—Title 11, Sections 83, 84, 91, Title 15, Section 393, Title 45, Sections 69, 70, Title 74, Section 18 Code of 1940.

1. (a) Costs accruing to sheriff on preliminary hearing are not limited by Title 11, Section 84, Code of 1940. (b) Costs of sheriff accruing on preliminary hearing not limited by Title 45, Section 69, Code of 1940. (c) Costs of sheriff accruing on preliminary hearing, where defendant is subsequently indicted and convicted, are payable by the State from the convict fund. (d) Where total costs exceeded \$250.00, unpaid balance of costs accruing to sheriff are payable under certain circumstances from the fine and forfeiture fund of the county. (e) Such balance of sheriff's costs is payable from the fine and forfeiture fund of the county in felony cases where execution against defendant is returned "no property found" (f) Such balance of sheriff's costs is payable from the fine and forfeiture fund of the county in misdemeanor cases either where execution against defendant is returned "no property found," or where defendant is sentenced to hard labor for costs. (g) Where case is nol-prossed or defendant acquitted, costs accruing to sheriff on preliminary hearing are payable from the fine and forfeiture fund of the county.

2. Fee of \$2.00 accruing to clerk on preliminary hearing is payable from the fine and forfeiture fund of the county only when the defendant is subsequently indicted and convicted.

3. Fees of witnesses are payable from the fine and forfeiture fund of the county only when defendant is subsequently indicted and convicted.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of April 26, 1944, is as follows:

"In line with our conversation in your office yesterday, I submit the following question for official opinion:

"When a defendant has been indicted and convicted, the State pays a portion—not over \$5.00—of the cost in preliminary hearing. Is the balance of the allowable fee of \$10.00 payable to the sheriff out of the Fine and Forfeiture Fund? Is the \$2.00 Clerk's fee for preliminary cases before the Judge of the County Court also payable out of the Fine and Forfeiture Fund?

"In case a man was indicted, after preliminary hearing, and the case was not prossed or the State failed to convict, would such fees of the Clerk and Sheriff and also the witnesses be payable out of the Fine and Forfeiture Fund not to exceed \$10.00?"

It is apparent from your inquiry that you assume that the fees of the sheriff on preliminary hearing come within that part of Title 11, Section 84, Code of Alabama 1940, which limits the costs of the committing magistrate and constable on preliminary hearing, both together, to \$10.00. It is my opinion that this is erroneous, and before answering your inquiry, it is deemed necessary to clarify this assumption.

It should be noted that the express terms of Title 11, Section 84, Code of 1940, insofar as this limitation is concerned, is directed only to committing magistrates and constables, and contains no reference to sheriffs. The manifest purpose of this statute is to make some provision for the payment of costs of certain persons participating in a preliminary hearing, that is, committing magistrates, constables, and witnesses, who without such provision, would have no other resource for the collection of their costs. It is a mere legislative boon and is the only statute allowing payment of such costs (Quarterly Report of the Attorney General, Volume 3, page 128). Furthermore, payment thereunder may be forthcoming only when the defendant is subsequently indicted and convicted.

Therefore, unless there appears a specific statutory provision necessitating the inclusion of sheriffs within the terms of this statute, they are not subject to the limitation therein imposed. The authority of the sheriff to serve process and perform other duties relative to a preliminary hearing is derived from Title 54, Section 18, Code of Alabama 1940, which section authorizes the sheriff to perform the duties of the constable. However, the fact that the sheriff in a particular instance is performing a service that might be rendered by a constable does not limit him to the fees provided for, or the limitations imposed upon, constables for rendering like services. In the case of **Trapp v. State, ex rel. Burgin**, 122 Ala. 394, 25 So. 194, in a treatment of the statute now embodied in said Section 84, it was held that a sheriff, when performing duties which could be performed by a constable, was not limited to the fees provided for constables for rendering such services, but was entitled to sheriffs' fees provided for rendering such service. See also Biennial Report of the Attorney General, 1930-1932, page 329.

Therefore, under the decision in the Trapp case, and because said Section 84, by its express terms, is applicable only to committing magistrates and constables, the sheriff, when performing the duties of a constable, is not only entitled to fees provided for sheriffs for such services, but is also not subject to the \$10.00 limitation imposed by said Section 84.

Inasmuch as Section 84 neither imposes a limitation upon the sheriff nor constitutes authority by which he may be paid costs incurred by him on preliminary hearings, it becomes necessary to find other authority for the payment of such costs. There is no statute authorizing payment of sheriffs costs of preliminary hearings. However, the Supreme Court of Alabama in the case of **Hawkins, ex rel. O'Brien**, 124 Ala. 102, held as follows:

"* * * * * the costs arising on the preliminary trial before the justice, in case the defendant is bound over, follow the case into the court in which he is bound to appear, and is taxed at the end of the prosecution and collected as the statutes require."

According to the **Hawkins** case, then the sheriff may collect his costs incurred upon preliminary hearing at the end of the prosecution in the court to which the defendant is bound in preliminary hearing, in the same manner authorized by statute for the collection of the costs incurred in such court.

In the event a defendant is convicted and sentenced to the penitentiary, the State pays from the convict fund certain items of cost incurred in the case, under the provisions of Title 45, Section 69, Code of 1940. Under the decision of the **Hawkins** case, costs of the sheriff accruing in preliminary hearings are payable by the State from the convict fund when the defendant is subsequently convicted and sentenced to the penitentiary.

So long as the total costs in any one case do not exceed \$250.00, the limitation imposed by Title 45, Section 70, Code of 1940, there is no limitation placed upon the amount of costs accruing to the sheriff either on preliminary hearing or subsequent proceedings in the cause which are authorized to be paid by the State from the convict fund.

That part of Title 45, Section 69, Code of 1940, which limits the payment of costs of the committing magistrates and constables on preliminary trial to \$5.00 is not applicable to costs of the sheriff on preliminary trial, under the same reasoning as hereinabove used in reference to the \$10.00 limitation imposed by Title 11, Section 84, Code of 1940, on committing magistrates and constables on a preliminary trial.

The opinions of this office found in Biennial Report of the Attorney General, 1926-1928, page 203, Quarterly Report of the Attorney General, Volume 29, page 13, and Quarterly Report of the Attorney General, Volume 32, page 106, insofar as they are in conflict with the above conclusions, are hereby overruled.

In the event the court costs in any case exceed the sum of \$250.00 which is paid by the State under the provisions of Title 45, Section 69, Code of 1940, supra, it is my opinion that the sheriff may, under certain conditions, collect

the unpaid portion of his costs accruing in preliminary hearings, or other proceedings in the cause, from the fine and forfeiture fund of the county.

Title 11, Section 83, Code of 1940, Subsections (d) and (e), provide as follows:

"(d) in all cases in which the defendant is convicted for a felony, fees for services rendered must be taxed and judgment rendered against the defendant therefor and paid by the state to the extent as provided by law, and all other fees of sheriffs, clerks of court and state's witnesses not paid by the state shall be claims against the fine and forfeiture fund in the event an execution against the defendant is returned 'no property found' and such claims are evidenced as required by law; (e) if the defendant is convicted of a misdemeanor and sentenced to hard labor for fine and costs, or either, the fees for services under this article shall be paid by the state to the extent as now provided by law, and no execution shall issue against the defendant, and the sentence for fines and costs, or either, shall have the effect of a return of the execution 'no property found', and all such unpaid fees of the sheriff, clerks of court and state's witnesses and shall be claims against the fine and forfeiture fund when evidenced as required by law; * * * "

Therefore, the sheriff is entitled to collect the balance of his costs accrued on preliminary hearings and other proceedings in the cause, and not paid by the State, from the fine aid forfeiture fund of the county in felony cases where an execution against the defendant has been returned "no property found," and in misdemeanor cases either where such return is made, or where the defendant is sentenced to hard labor for fine and costs.

In the event the case is nol-prossed or the defendant is acquitted upon the trial, the sheriff is entitled to collect his costs from the fine and forfeiture fund of the county under the provisions of Title 15, Section 393, Code of 1940. Under the decision of the **Hawkins** case, *supra*, this includes cost accruing to the sheriff on the preliminary hearing.

An opinion of this office to Hon. Ben P. Singleton, Chief Examiner of Public Accounts, under date of March 24, 1944, in which it was held that costs accruing to the sheriff in preliminary hearings were not payable from either the fine and forfeiture fund or the convict fund of the State, is hereby expressly overruled insofar as it conflicts with the conclusions hereinabove reached.

In reference to the \$2.00 fee provided for clerks on preliminary hearings, it is my opinion that where the defendant has been subsequently indicted and convicted, such fee is payable to the clerk from the fine and forfeiture fund of the county. Title 11, Section 91, Code of 1940, the statute authorizing such fees, provides that it shall be payable as other items of cost incurred by the State. There is no provision for the payment of this fee by the State from the convict fund under Title 45, Section 69, Code of 1940, and, therefore, payment thereof must be from the fine and forfeiture fund of the county. See Quarterly Report of the Attorney General, Volume 9, page 9.

Inasmuch as this fee of the clerk is provided for by separate statute, it does not come within the \$10.00 limitation imposed upon committing

magistrates and constables on preliminary hearings by Title 11, Section 84, Code of 1940. An opinion of this office, Quarterly Report of the Attorney General, Volume 8, page 240, holding otherwise, is expressly overruled.

However, in the event the case is nol-prossed or defendant is acquitted, it is my opinion that the clerk cannot collect this fee of \$2.00 from the fine and forfeiture fund of the county, for the reason that said Title 11, Section 91, Code of 1940, authorizes the payment of such fee to the clerk only "when the defendant is subsequently convicted and sentenced to the penitentiary or hard labor."

In regard to witness fees accruing on preliminary hearings, it is my opinion that such fees are not payable from the fine and forfeiture fund when the defendant was subsequently indicted and found not guilty or the case against him nol-prossed. Title 11, Section 84, Code of 1940, is the only provision of law which can be construed to authorize the payment of witnesses' fees accruing on preliminary hearing from the fine and forfeiture fund of the county. However, such payment is expressly predicted upon the defendant's being convicted and sentenced to the penitentiary or to hard labor. An analogous conclusion was reached in an opinion of this office to Hon. W. M. Cousins, Jr., Clerk, Circuit and Inferior Courts of Elmore County, under date of March 10, 1941, Quarterly Report of the Attorney General, Volume 22, page 207, in which it was held that witnesses appearing for the State in a preliminary hearing are not entitled to payment of their fees from the fine and forfeiture fund of the county when the grand jury failed to indict the defendant. Therefore, witnesses' fees accruing on preliminary hearing are payable from the fine and forfeiture fund of the county only when the defendant is subsequently indicted and convicted.

Yours very truly,

WILLIAM H. McQUEEN,

Acting Attorney General.

May 22, 1944.

Hon. J. F. Laseter

Judge of Probate

Barbour County

Clayton, Alabama

Automobiles—License—

Private automobile, properly licensed in the State of Georgia, is not subject to imposition of an Alabama license while temporarily in this State.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of May 11, 1944, is as follows:

"Mr. J. Giles, who has been working in Clayton for several years, coming here from Dawson, Georgia, has a sister who lives in Dawson, Georgia. Several months ago this sister had to go to the hospital. She has two farms near Dawson, Georgia. No one was left there to look after her farms, so it was up to her brother here in Clayton to take on this job. He had no conveyance to go to and from Clayton, Alabama and Dawson, Georgia, so he begun using his sister's car. He goes to Georgia three to four times a month. On each trip he must travel a distance of two hundred miles, one hundred and fifty five miles of this trip is traveled in Georgia and the other forty five is made in Alabama. He drives this car very little in Clayton, Alabama, just mostly to go to and from his work in Clayton. This car is owned by his sister, who resides at Dawson, Georgia. The Georgia tag is in her name, the gas for this car is issued by the OPA at Dawson, Georgia in her name. The State and County taxes are paid in Terrell County, Georgia, City taxes are paid in Dawson, Georgia. This car seems to me must carry a Georgia tag. Mr. Giles has been cited by our License Inspector. It seems to me that the reciprocal agreement between Alabama and Georgia would take care of this situation.

"If a tag should be bought in Alabama, this would mean that they would have to pay State and County tax here when they buy a new tag next October. This would mean that they would be compelled to pay tax in two states. I will greatly appreciate it if you will give me your opinion on this as quickly as possible, as the license inspector insists that a tag be bought immediately."

It is my opinion that the involved automobile is not subject to the imposition of the Alabama license.

In reaching this opinion, I am not unmindful of the numerous cases holding that:

"The situs of property, not the domicile or residence of the owner, is the test to which the liability to taxation must be submitted. *Tennessee Coal & Iron Co. v. State*, 193 So. 143, 239 Ala. 19. *Trammell v. Conner*, 91 Ala. 398, 8 So. 495, wherein the Supreme Court held, on authorities from New Jersey, California, Nevada and Missouri, that personal property may acquire such a local situs in the county in which it is kept and used as to become liable to taxation thereof, although the owner resides in another county and has there returned it for taxation. The illustration used was that of a portable sawmill and a yoke of oxen used in connection with such manufacturing machinery. Mr. Justice Clopton for the Court observed: 'In order, however, to render the property liable to taxation, its situs must be permanent in its nature, though not so permanent as real estate. It must have no actual location elsewhere. Property in transit, or temporarily in the county, is not subject to assessment merely because it happens to be in the county on the day the assessment commences. * * * *'" (Underscoring supplied.)

Clearly, from the factual situation contained in your letter, neither Mr. Giles nor his sister (the owner of the automobile) intended that the vehicle should, nor does it appear that it has acquired, a situs in Alabama. Instead, it appears that Mr. Giles has only temporary custody of the vehicle for the

specific purpose of traveling between Clayton, Alabama, and Dawson, Georgia. That he may occasionally use such vehicle for his own purpose in Alabama, I believe, is immaterial.

The courts have established certain rules to assist in interpreting license statutes including the following:

"Where the language of license statute is reasonably capable of two constructions, that most favorable to taxpayer must be adopted." **Williams v. Pugh**, 24 Ala. App. 57, 129 So. 792, **Carruth v. State**, 24 Ala. App. 158, 132 So. 65.

"Every doubt as to construction of statute imposing license tax must be resolved in taxpayer's favor, and construction most favorable to him adopted, where language is susceptible of two constructions." **State v. Dr. Pepper Bottling Co.**, 26 Ala. App. 125, cert. den. 228, Ala. 607, 155 So. 92-93; **J. R. Raible Co. v. State Tax Commission**, 29 Ala. App. 184, cert. den. 239 Ala. 41, 194 So. 556-560.

Section 707, Title 51, Code of 1940, pertinently provides as follows:

"§ 707. Effect of provisions relative to registration and display of tags on non-residents.—The provisions of the foregoing sections relative to registration numbers shall not apply to a motor vehicle owned by a non-resident of this state and not used for hire (or used for commercial purposes) in this state, for a period of thirty days from date of entering the state, provided that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence * * * * *"

The same Section further provides:

"The department of revenue of Alabama is hereby authorized to make reciprocal agreements with other states for an exchange of rights for the operation of motor vehicles that will be considered as a fair exchange of rights and privileges. The said rights and privileges to be in effect as long as both contracting parties recognize the rights of the other. * * * *"

Pursuant to the latter provision (for a more comprehensive discussion of which see Vol. 11, Report of the Attorney General, page 50), the proper authorities of Alabama and Georgia entered into a reciprocal agreement dated June 17, 1941, which included the following:

"Paragraph 2. Privately owned or operated passenger cars shall be permitted to operate between the two States without the payment of any additional fees or license taxes, provided, however, that continuous residence for a period of thirty (30) days, or gainful employment for a period of thirty (30) days shall constitute the establishment of a legal residence for the purpose of motor vehicle registration."

In my opinion, this reciprocal agreement is as much a part of the license laws of Alabama as if it had been incorporated within the specified code section, and giving this agreement between Alabama and Georgia the respect and dignity it commands, I hold that the involved automobile is not subject to the imposition of an Alabama license.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 23, 1944.

Hon. Joe N. Poole, Commissioner

Department of Agriculture and Industries

P. O. Box 220

Montgomery 1, Alabama

Foods—Mixture containing less than 8% milk fat cannot be sold as ice cream. Title 2, Section 196, Code of Alabama 1940.

Ice Cream—Mixture containing less than 8% milk fat cannot be sold as ice cream. Title 2, Section 196, Code of Alabama 1940.

Foods—Mixture resembling ice cream but not an imitation may be sold under the trade name if place of manufacture appears on the label. Title 2, Section 309, Code of Alabama 1940.

Foods—Article of food resembling ice cream and an imitation thereof must be labeled "imitation" and contain a list of the ingredients. Title 2, Section 309, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of April 20, 1944, is as follows:

"Can a mixture consisting of ice cream and another frozen food product, such as an ice or sherbert, be legally sold in bulk form in Alabama, if the resulting mixture is called by a trade name not indicating the ingredients nor being the name of a product whose ingredients are known by the public, if the resulting mixture fails to conform to the standard of ice cream as set out in Article 13, Chapter 1, Code of Alabama 1940, and regulations promulgated thereunder. The mixture is sold in bulk form and resembles ice cream in appearance.

"Can such a mixture or substance as mentioned above and sold under a nondescriptive trade name, and failing to conform to said standard for ice cream, be so packaged or labeled as to not be adulterated or misbranded within the meaning of the provisions of Articles 13 and 18, Chapter 1, Title 2, Code of Alabama, 1940."

It is my opinion that the mixture referred to in your inquiry cannot be sold as ice cream for the reason that the mixture fails to conform to the standard (minimum, less than 8% milk fat). On the otherhand, such mixture can be sold if it is wholesome and is properly labeled showing the ingredients contained therein.

I

It is stated in your inquiry that the mixture consists of ice cream and another frozen product and that the resulting mixture fails to conform to the standard for ice cream as prescribed by Title 2, Section 197, Code of Alabama 1940, and I presume that you mean that the mixture contains less than 8% milk fat. Upon these facts alone it is clear that such a mixture cannot be sold as ice cream for the reason that it falls below the minimum standard of ice cream expressly prescribed by Title 2, Section 196, Code of Alabama 1940. Furthermore, if it is labeled as ice cream and does not contain 8% butter fat, the product is adulterated under provisions of Title 2, Section 197, Code of Alabama 1940, stating that ice cream is adulterated "if in quality or grade it is lower than the professed standard of quality or grade under which it is sold or offered for sale." If the mixture is labeled ice cream, it is adulterated under the provisions of Title 2, Section 306, Code of Alabama 1940, which provides that an article is adulterated "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, * * * if it does not conform to the standard of purity or quality established for the article. * * "

The mixture, if sold under the name of ice cream would also be misbranded under the provisions of Title 2, Section 308, Code of Alabama 1940, providing that the term "misbranded" applies to all foods, the package or label of which shall contain "any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, * * * ." The article would also be misbranded under the provisions of Title 2 Section 309, Code of Alabama 1940, under that part of said section that defines food as misbranded "if it be offered for sale under false representations."

The statutes of many states define the quality of ice cream and prescribe the amount of milk fat to be contained in this common food. Such statutes have been uniformly upheld as measures designed to prevent a fraudulent deception of the public in the sale of a food product. **Hutchison Ice Cream Co. vs. Iowa**, 242 U. S. 153, 61 L. Ed. 217, 37 S. Ct. 28. **Crowl vs. Commonwealth**, 242 U. S. 153, 61 L. Ed. 217, 37 S. Ct. 28. To the contrary see **Rigbers vs. Atlanta**, 7 Ga. App. 411, 66 S. E. 991, and **New Orleans vs Toka**, 141 La. 551, 75 So. 238.

No further argument is necessary, therefore, to show that the mixture referred to, containing less than 8% milk fat, cannot be sold as ice cream. See 22 Am. Juris., page 848, section 57.

II

If the mixture is not labeled or sold as ice cream, it is my opinion that it could be properly labeled and sold in the State by a compliance with the law of Alabama. From facts stated in your inquiry I cannot determine whether the mixture is "an imitation" or not. The fact that it resembles ice cream in appearance would indicate that it is an "imitation." Other facts should be taken into consideration also, such as taste and use. If you determine that the mixture is an "imitation" of ice cream, before such products can be sold in the State of Alabama, it should be labeled in accordance with the provisions in Title 2, Section 309, Code of Alabama 1940 by having the

word "imitation" marked upon the container, accompanied by a list of the ingredients contained in the mixture. If the article is not sold as ice cream but sold under a trade name and is **not an imitation**, that is, does not resemble ice cream in appearance or other properties, it is sufficient if the label states the place where such article is manufactured or produced. Title 2, Section 309, Code of Alabama 1940. Thus, if the article is sold under a trade name and the package lists the ingredients and contains the place where it is manufactured or produced and is not offered for sale, over the counter or otherwise, under false representations, there is no violation of the Alabama law Title 2, Section 309, Code of Alabama 1940.

In conclusion it should be stated that although the statutes of Alabama define a standard of quality for ice cream (Title 2, Section 196, Code of Alabama 1940), they do not define a standard for mixtures resembling ice cream. However, those mixtures resembling ice cream to such an extent that they are "imitations" should be properly labeled as an imitation and have listed thereon the ingredients, since the Alabama Pure Food and Drug Act was enacted "to prevent frauds upon the public." Title 2, Section 186, Code of Alabama 1940.

"In view of the public policy evidenced by the terms of the statute, immunity cannot be established by substitution of a mere trade-name for a product which its constituent elements fairly identify as one embraced within the terms of the regulating statute.

"The right of the state, under the police power, to enact laws which are designed to provide a minimum amount of nutritional elements and prevent fraud and deception in the sale of foodstuffs extends to ice creams and to dairy products made in the semblance of ice cream, and such enactments are not arbitrary, excessive or unlawful exercises of the police power, and do not violate the Fourteenth Amendment to the Constitution of the United States, * * * * *"

State vs. McCosh, Supreme Court of Nebraska, 279 N. W. 775, 777.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 27, 1944.

Hon. H. R. Howze

Judge of Probate

Jefferson County

Birmingham, Alabama

Taxation—Exemptions—Corporations—Title 10, Section 150, Code of 1940—Title 51, Section 2 (d), Code of 1940.

The property of Alabama Research Institute, a nonprofit scientific institution organized under the provisions of Title 10, Sections 150, et seq., Code of 1940, when used in the regular business of such institution, is exempt from ad valorem taxation under the provisions of Title 51, Section 2 (d), Code of 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of May 25, 1944, is as follows:

"Your official opinion is respectfully requested on the following question:

"Are the properties of Alabama Research Institute, a non-profit corporation organized under Code 1940, Title 10, Section 150, exempt from ad valorem taxation under the provisions of Code 1940, Title 51, Section 2(d) or other provisions of law, when such properties are employed and used in the regular business of such institute?"

"For your information, a copy of the constitution and by-laws of the corporation and a pamphlet entitled 'Alabama Research Institute', which sets out the purposes and program of the corporation, are attached hereto.

"I am informed that the services of this corporation will not be confined to the State of Alabama, that its services will be available to citizens of other states and that amendments to the constitution and by-laws of the corporation are proposed to indicate by change of name and restatement of its objects and purposes the broad scope of the proposed program of the corporation. A copy of these proposed amendments is also attached."

It is my opinion that Alabama Research Institute is exempt from ad valorem taxation under the provisions of Title 51, Section 2 (d), Code of 1940.

Title 10, Section 150, Code of 1940, the statute under which Alabama Research Institute was organized and operates, according to the facts stated in your request, provides for the organization of societies for public improvement.

The purposes of this corporation are found in Section 1, Article Two, of its Constitution, which Section is as follows:

"Section 1. Alabama Research Institute is formed to promote the general welfare of the State of Alabama and its citizens and for the promotion of other public purposes; to aid through scientific research in the utilization of the natural resources of the State of Alabama and in the development of agriculture, industry, and to that end (a) to coordinate and utilize existing agricultural, industrial and commercial research facilities and operations within the state, and to organize, own, operate and utilize such research facilities within or without the state as may be found necessary or desirable; (b) to determine by scientific research or economic studies whether there are resources or facilities within the state which may be profitably developed, produced, manufactured or used, and to promote the development, production, manufacture or use of such resources; (c) to investigate and further the economic and scientific development, production and manufacture within the state of new or improved agricultural, industrial and commercial products whether such products originate within or without the state; (d) to cooperate with and assist agriculture, industry and commerce within the state in economic studies and in the utilization of organized scientific research."

Section 2, Article Two, of its Constitution provides that the corporation shall not have any capital stock nor pursue any of its purposes for pecuniary profit to any of its members. The nonprofit nature of this organization is in accord with the provisions of Title 10, Section 150, Code of 1940, under which it was created and operates.

It appears from the above mentioned sections of its Constitution that Alabama Research Institute is a scientific institution. Title 51, Section 2, Code of 1940, provides in part as follows:

"The following property and persons shall be exempt from ad valorem taxation and none other: * * * (d) all of the property of literary and scientific institutions and literary societies, when employed or used in the regular business of such institution."

Therefore, it is my opinion that the property of Alabama Research Institute, so long as it is used in the regular business thereof, is exempt from state and county ad valorem taxes.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 29, 1944.

Hon. E. T. Knight, Chairman

Board of Revenue

Cullman County

Cullman, Alabama

Counties—Budget—County Financial Control Act—Board of Revenue—Preferred Claims against County—Personal Liability of Board Members—Title 12, Sections 74, 88, 90, and 121 of the 1940 Code of Alabama—Local Acts.

1. Cullman County Board of Revenue may revise its budget to meet changed conditions occurring during fiscal year, but it may not appropriate funds in excess of total income of revised budget except in case of emergency.

2. Local Act making a claim of \$6,000.00 per annum preferred against the general fund of Cullman County for roads and bridges does not prevent the Board of Revenue of such county from revising its budget so as to discontinue making monthly payments to the Road Commission and appropriating such funds for the payment of prior claims enumerated in Section 121 of Title 12 of 1940 Code of Alabama.

3. If the County Board of Revenue orders an expenditure not authorized by law or in excess of its budget adopted under the county Financial Control Act, the Board members are personally liable.

Opinion by Assistant Attorney General Cooper.

Dear Sir:

Your request for an official opinion, bearing date of May 18, 1944, is as follows:

"We would appreciate your giving us an official opinion on the following:

"1. When a budget is set up and the budget is used up before the end of the fiscal year does the Board of Revenue have authority to go on, in debt to pay for the materials used by that office for the balance of the fiscal year?

"When our books were examined the auditors reminded us of the financial condition of our general fund which we know to be in very bad shape, due to the fact that so many more expenses have been placed on the county with no additional revenue to take care of them; namely—\$6,000.00 per year to be paid out of the general fund to the road department by local act.

500.00 per year additional fees to the Circuit Clerk.

500.00 per year additional salary to members of the Board of Revenue,
Local act.

900.00 per year additional salary to Chief Deputy Sheriff.

600.00 per year additional salary to Deputy Sheriff.

\$8,900.00 per year additional expenses that can be named out-right.

Plus increase in various fees paid to the sheriff; increase in salary to janitor of courthouse and annex, increase in salary janitor county jail, and increase in salary of matron of county jail. These last salary raises were necessary in order to get help.

"When our budget was set up it was set as low as possible and in many instances it will be impossible for the offices to stay within their budget. As the enclosed figures will indicate the Probate Judge is especially in bad shape, inasmuch as he has used as of March 31 all but \$687.18 of budget and as of April 30 had only \$282.32 left, which will be more than taken up when the orders now on file for him will have been received. Last year he exceeded his budget by \$2,209.21.

"2. The \$6,000.00 per year is listed as a preferred claim in the bill but is not, in our opinion, a necessary function of county government and we are wondering if it is necessary to pay the balance of this when it does not appear that we are going to be able to finish out the year on the money that we now have. However, we are perfectly willing to pay it or any other legal claim against the county as long as our money holds out but we have been advised by the auditors that we must save enough back to take care of the necessary functions of county government and we should appreciate your advising what we should do.

"3. If the Board exceeds its budget are the Commissioners themselves held responsible in payment of this excess; in other words, if the county spends more than the budget allows are they liable for amount spent above the budget of the county?

"We are attaching herewith a copy of the county budget for the fiscal year 1943-44, financial statement as of March 31, 1944, and work sheet covering the operations of the county for the past seven months. If any additional figures are needed we shall be glad to furnish them and please do not hesitate to call for them."

"We are very anxious to get a ruling on this so that we will know exactly what to do.

"You will note from the financial statement that our special funds are in good shape; our main concern is the general fund."

The Board of Revenue of Cullman County has authority to amend or revise its budget formulated in compliance with Title 12 of the 1940 Code of Alabama where changed conditions during the fiscal year require it. **Biennial Reports of Attorney General, 1936-38, page 42. Biennial Reports of Attorney**

General, 1936-38, page 318. Such governing body of the county may appropriate for the various purposes budgeted not to exceed the estimated total income available. Title 12, Section 74, 1940 Code. It may also issue interest-bearing warrants if, after an inquiry, it finds that an emergency obligation has arisen in a situation resulting from an act of God or the public enemy, and for which no monies from the current year's income are available to pay. These warrants become a part of the budget for the year in which the interest and principal mature. Title 12, Section 90, Code 1940.

The claims to be preferred and priority of their payment are itemized in Section 121 of Title 12 of the 1940 Code, and the budget required by law to be made by the County Board of Revenue must make provisions for the payment of same. The claims enumerated in this section should be paid in full before any other claims are paid. **Biennial Reports of Attorney General, 1936-38, page 538.**

In your budget, a copy of which you forwarded to me and is returned enclosed, makes provision for the payment of \$6000.00 to the Road and Bridge Commission under the requirement of Local Acts of 1943, H. 324, page 27, which makes such claim a preferred claim against the general fund of the county. The Act provides that the \$6000.00 shall be payable in monthly installments of \$500.00 for the construction and maintenance of roads and bridges.

While this claim is made a preferred one by statute, the priority of its payment follows all items enumerated in Section 121 *supra*. An appropriation must be made for its payment if funds are available after appropriations are made for the payment of prior claims set out in Section 121, *supra*. If the estimated income in the original budget, or in any revised budget, is insufficient to cover the estimated expenditures for the claims having priority over it, no appropriation need be made for this item.

No department or agency of the county may incur any obligation over and above the amount or amounts approved by the governing body of the county. Section 88, Title 12 of the 1940 Code. See **Biennial Reports of Attorney General, 1936-38, page 42.** No payment shall be made out of the county treasury except as authorized by law and any officer who pays out of the county treasury an unauthorized claim is liable on his official bond. See **Biennial Reports of Attorney General, 1936-38, page 647.** In my opinion members of the Board of Revenue ordering expenditures in excess of the amount allotted in its budget are personally liable. See 20 C. J. S., page 882.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 29, 1944.

Hon. Hayse Tucker, Director

Department of Finance

Montgomery, Alabama

State tidelands—Code 1940, Title 55, Section 66, Title 47, Section 57—

Tidelands within the boundaries of the State at the time it was admitted to the Union are subject to sale, provided such sale does not interfere in any way with navigation.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of May 20, 1944, is as follows:

"There are certain tidal lands in Sections 6, 7, and 18, TS-4S, Range 1 East, Mobile County, Alabama, which have been formed and is still being formed by alluvium. This land is under water at high tide, and it is not claimed by any one, and is not being assessed for taxes.

"I am in receipt of a letter from the General Land Office, Washington, D. C. (copy enclosed) advising that this property belongs to the State of Alabama. Please advise me at your earliest convenience as to whether the State of Alabama has title to the property, and if it can be sold by the State.

"This property is not a part of the lands known as 'swamp and overflow' lands that were granted to the Alabama Insane Hospital. You will see from the attached letter that in 1845 it was shown as the bed of Pole Cat Bay.

"I am enclosing herewith a tracing of the plats in the General Land Office in Washington and a map prepared by the State Docks.

"Please return the map and tracing with your official opinion."

It is well settled that tidal lands, or lands covered at high tide by water, as well as the beds and shores of navigable waters within the boundaries of the State at the time it was admitted to the Union are the property of the State. *Borax Consolidated v. City of Los Angeles*, 296 U. S. 10, 80 L. Ed. 9; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565. It would seem to be beyond controversy, therefore, that the lands above described and referred to which have been formed by alluvium in Mobile Bay are the property of the State of Alabama and as such subject to sale pursuant to Code 1940, Title 55, Section 66, Title 47, Section 57.

It is to be noted however, that in making such sales care should be taken that the property is not to be used in any way that might interfere with

navigation. Navigable waters are irrevocably dedicated to the public use. Constitution of 1901, Section 24.

I am returning herewith the plat and tracing as you requested.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 29, 1944.

Hon. H. W. McKinzie, County Treasurer

Marion County

Hamilton, Alabama

Marion County—County Treasurer—Local Acts 1923, p. 130—Local Acts 1931, p. 225—Code 1940, Tit. 12, Section 33; Tit. 12, Section 4.—

1. The duties and responsibilities of the county treasurer of Marion county are the same as those prescribed by Code 1940, Tit. 12, Section 33. Claims against the county should be paid by him to the extent they are audited and allowed by the county governing body as evidenced by warrant drawn by it upon the county treasurer.

2. Such warrants should not be drawn upon a county depository designated upon application by the county treasurer to the governing body pursuant to Code 1940, Tit. 12, Section 4.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of May 17, 1944, is as follows:

"Please give me your opinion on the following question:

"What are my duties and responsibilities as County Treasurer of Marion County, Alabama, under local act of 1923 for Marion County, approved Sept. 3, 1923, and amended by Local act of 1931, page 225, approved July 17, 1931; and is it legal for the Commissioners Court to audit and allow claims against the County and draw a warrant on the county treasurer and have same paid by the designated depository for the treasurer to deposit money, without same being presented to county treasurer for his indorsement or authority to the depository to pay the warrant?

"What would be the liability of the county treasurer in the event a claim is proved to be illegal, not properly itemized and for work or services not rendered or done, and no record on the minutes of the Commissioners

Court allowing said claim has been made? That is, where minutes of said Court have not been written for a long period of six months or some such period?

"Would it be the duty of the county treasurer to notify his depository not to pay claims until they have been allowed and a record of the allowance recorded on the minutes of the said Court, or other record kept for that purpose?"

Neither the original Local Act of 1923, nor the amendment of 1931 (Local Acts 1923, page 130; Local Acts of 1931, page 225) to which you refer, undertakes to prescribe the duties or fix the responsibilities of the county treasury of Marion County. The effect of this legislation was to place Marion County in the same category as other counties wherein a county treasurer is duly elected according to law (Code 1940, Title 12, Section 30) and to remove the county from the operation of Code 1940, Title 12, Section 43.

The duties of such county treasurers and their responsibilities, whether they be elected under general law or pursuant to some local act, are, in my opinion, those which are prescribed by Section 33, Title 12.

In *Ellis v. Batson*, 177 Ala. 313, 58 So. 193, it was held that the county treasurer could not delegate to some other person the duties and responsibilities imposed upon him by law. See also **Quarterly Report, Attorney General**, Volume XIV, page 45.

Section 33, Title 12, *supra*, enumerates in detail the various duties of the county treasurer—among them, his duty to pay such claims as have been allowed and audited by the county governing body, to the extent they have been so allowed, and his duty to keep registers of claims against the general fund, special funds, and the fine and forfeiture fund.

I am of opinion, therefore, that as county treasurer you alone should pay all such claims as are by warrant drawn upon you, and that you should see to their payment out of the appropriate funds subject thereto. In other words, there is no authority of law for payment of such warrants by the designated depository without your approval.

The only effect of Section 4, Title 12, whereby a county treasurer may apply to the county governing body for designation of a depository, is to relieve the treasurer and his surety from liability arising upon insolvency of the depository. Said section does not in anyway affect or modify the duties and responsibilities of the treasurer as fixed and declared by law.

Nor, in my opinion, are the provisions of Section 43-53, Title 12, applicable to the county treasurer of Marion County. They apply only to counties with a population of not more than 56,000 where in the county treasurer is not elected.

Your remaining questions are of such general and indefinite nature as to admit of answer only in general terms. Whether or not a county treasurer is liable for the payment of illegal claims, or for a claim not properly itemized, or for work not done or services not rendered, must depend upon the particular facts and circumstances attending each individual claim or transaction.

In the absence of a statement of particular facts and circumstances, I am unable to give you any satisfactory answer.

If you have in mind some particular claim as to which you are in doubt, and will submit a statement of facts with reference thereto, I will be glad to furnish an opinion.

In conclusion, as to the duty of a county treasurer to notify a county depository not to pay claims until they have been allowed, the only answer is that the depository should not pay claims until they have been audited and allowed, and you have directed payment. The depository is, after all, only a depository and cannot exercise any of your functions. Its duty is merely to receive and disburse funds. It cannot usurp any of your duties.

As to claims known to you to be invalid, whether such invalidity appears upon the face of the records of the county governing body or otherwise, although they may have been allowed by the governing body, it is your duty to refuse to pay such claims, "and to present on behalf of the county the defense of such county to such claims." Otherwise you pay the same at your peril. **Mobile County v. Williams, Probate Judge**, 180 Ala. 639, 61 So. 962: **Quarterly Report Attorney General**, Vol. X, page 105.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 30, 1944.

Hon. E. P. Russell, Director

State Department of Corrections and Institutions

CAPITOL

Convicts—Fine and Forfeiture Fund—Witnesses

Actual expenses incurred in removing convicts for the purpose of giving testimony for the State in criminal cases paid to the Director of the Department of Corrections and Institutions in the same manner as mileage fees for State witnesses. Title 45, Section 62, Code of Alabama 1940.

Title 45, Section 62, Code of Alabama, 1940.—Actual expenses incurred in removing convicts for the purpose of giving testimony for the State in criminal cases paid to the Director of the Department of Corrections and Institutions in the same manner as mileage fees for State witnesses.

Words and Phrases—"Actual expenses", as used in Title 45, Section 62, Code of Alabama 1940, are expenses incurred by the Department of Corrections and Institutions that are reasonably necessary to transport a convict witness from his place of confinement to the court and to return him to the institution.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated May 3, 1944, is as follows:

"Under Title 45, Section 62, 1940 Code, provision is made for reimbursement to the Department of Corrections and Institutions for actual expenses incurred in the removal of convicts for the purpose of giving testimony for the State in criminal cases, and the matter has been dealt with in an opinion to Hon. J. H. Green, Clerk, Circuit Court, Morgan County, Decatur, Alabama, dated July 31, 1941, Quarterly Report Attorney General, Volume 24, page 119; however, the following questions have not been answered, and I request your opinion thereon:

"1. Since the statute does not provide the manner in which claim shall be presented, I should like to know when, by whom and to whom it shall be presented, and what shall constitute actual expenses, with respect to accompanying guards and transportation.

"2. While not of primary interest to this department, no doubt an answer to the following question will serve a useful purpose to all concerned: If claim is to be presented to the court clerk, how is it to be taxed in the bill of costs, and what procedure should the clerk follow with reference thereto?"

It is my opinion:

(1) The claim for actual expenses incurred in removal as provided for in Title 45, Section 62, Code of Alabama 1940 should be presented within five days after the convict witnesses attend court. The claim should be presented by the Director of the Department of Corrections and Institutions. The claim should be presented to the clerk of the circuit court in which the convict witnesses attended. Actual expenses would include, among other items, hire of necessary guards, transportation costs of convicts and guards, and any other costs reasonably necessary in the removal.

(2) The amount of the charge should be taxed in the same manner as costs in the bill of costs and the clerk should follow the same procedure in reference thereto as he does in connection with mileage compensation of witnesses.

At common law, the attendance of witnesses restrained of their liberty could generally be compelled by the issuance of a writ of habeas corpus ad testificandum directed to the officer or person in whose custody the witness was. *State vs. Brown*, 118 Ala. App. 205, 89 So. 862, cert. den. *Ex Parte Brown*, *State vs. Brown*, 206 Ala. 528, 91 So. 306. In making an application for the writ in a civil procedure, it was necessary for the petitioner to tender or pay to the custodian expenses of bringing up and returning his prisoner, but such expenses did not have to be tendered when the writ was issued at the instance of a defendant in a criminal prosecution. 70 C. J. S., page 64, section 56. This procedure is superseded by Alabama statute.

Title 45, Section 61, Code of Alabama 1940 provides that in certain instances the presiding judge of the circuit court may order the Director of the Department of Corrections and Institutions to produce a convict in court in order to testify in behalf of the State. The following section, Section 62, provides as follows:

"§ 62. Fees, guards, escapes, etc., on such removal; receipt of prisoner by sheriff.—For conveying any convict under the provisions of the preceding section, the department is entitled to the actual expenses incurred in such removal, including the hire of necessary guards and their expenses; the guards and the convict are subject to the same liabilities and penalties for an escape, or attempt to escape; the sheriff or jailer of the county must, on demand of the officer having charge of the convict, receive and safely keep such convict in the county jail during his attendance on the court, or while delayed in passing through the county, and is entitled to the usual legal charge for feeding prisoners."

Ordinarily, the witnesses for the State in a criminal case are entitled to "five cents for each mile to and from their residence by the route usually travelled and all necessary ferriages and toll." In XXIV Quarterly Reports of the Attorney General, page 119, it was decided that the convict witnesses were not entitled to mileage. This ruling was evidently based upon the fact that "the unquestionable purpose for allowing a witness mileage is to take care of the expenses that he must incur in travelling to and from court." Of course, a convict brought to court under provisions of Title 45, Section 61, Code of Alabama 1940 does not incur any expenses, but the Department of Corrections and Institutions necessarily incurs the expense. It is my opinion that Title 45, Section 62, *supra*, was enacted to compensate the Department of Corrections and Institutions for the expense of transporting convicts to

court and that such costs should be paid in the same manner and from the same fund and under the same procedure as is mileage compensation to State witnesses. Therefore, the cost of transportation and other expenses enumerated in Title 45, Section 62 should be taxed as costs and paid under the provisions of Title 11, Sections 104 and 110, Code of Alabama 1940. In other words, since the convict witnesses bear no expenses in travelling to court, the Legislature has provided that the Department of Corrections and Institutions, bearing the expenses, be compensated for such expenses.

Since Title 45, Section 62 provides that the Department is entitled to the actual expenses, it is my opinion that the Director of the Department of Corrections and Institutions should claim the expenses. Furthermore, since the compensation directed to be paid is in the nature of mileage ordinarily paid to witnesses, claim should be presented to the clerk of the circuit court in the same manner as mileage claims are presented by other State witnesses. Title 11, Section 104, 110. The claim should be presented within five days after his attendance as such witness. Title 11, Section 46, Code of Alabama 1940. 25 Quarterly Reports of Attorney General, page 24.

"Actual expenses", as used in Title 45, Section 62, is said by that section to include the hire of necessary guards, the expenses of those guards; and it is my opinion that the statute is broad enough to include any expenses incurred by the Department of Corrections and Institutions that are reasonably necessary to transport the convict witness from his place of confinement to the court and to return him to the institution.

In taxing the actual expenses incurred in such removal in the bill of costs, the actual expenses should be itemized and taxed in the same manner as mileage.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 12, 1944.

Hon. Hayse Tucker, Chairman

State Board of Adjustment

Department of Finance

Montgomery 4, Alabama

Superintendent of Insurance—Duty of Comptroller—Repayment to Superintendent of Insurance for overpayment into Treasury—Title 51, Section 338 of Code—State Board of Adjustment—No jurisdiction to award repayment of money erroneously paid to Superintendent of Insurance for Premium Taxes.

The State Board of Adjustment has no jurisdiction to award a decree to pay an insurance company \$11,254.49 which it overpaid by an erroneously drawn check to Superintendent of Insurance in remitting premium taxes since the amount overpaid into the treasury must be returned to such officer who is liable in court action to insurance company.

Opinion by Assistant Attorney General Cooper.

Dear Sir:

Your request for an official opinion, bearing date of May 30, 1944, is as follows:

"On or about April 27, 1944, Rhode Island Insurance Company filed a petition with the State Board of Adjustment seeking a refund from the State Treasurer in the amount of \$11,254.49 which had been paid on April 7, 1944, to the Bureau of Insurance by a check or checks erroneously drawn and shown by the records of that agency to be in excess of the amount due for premium taxes under the revenue laws in the amount claimed. The check or checks were endorsed by the Bureau of Insurance over to the State Treasurer and were subsequently paid by the company's bank before discovery of the error.

"The appropriation for the payment of awards on decrees of this Board is, as you know, in the total amount of \$50,000.00 and an award in the amount claimed would seriously deplete our appropriation. This causes considerable concern because we may not be able to take care of other claims that might arise.

"It will be appreciated if you will give me your official opinion on the question of whether there is any provision of law whereby the refund may be made without resort to a decree of this Board."

The office of the Superintendent of Insurance is created by statute, and the duties of such officer, all of which are purely ministerial, are prescribed by Sections 46 and 47 of Title 28, 1940 Code. One of his duties is to collect the taxes due from insurance companies. (Section 46). Another duty is to

make settlements required by law with the Treasurer. (Section 47). Premium taxes of insurance companies are provided for by Title 51, Section 816 et seq. 1940 Code.

It is the Comptroller's duty to see that the returns, reports, payments, and settlements required by law to be made by any and all officers charged with the collection of revenues of the State are promptly made by such officers at the times they are required. (Title 51, Section 335, 1940 Code.) Section 338 of Title 51 provides as follows:

"§338. Overpayments into state treasury.—The comptroller must draw his warrant on the state treasurer in favor of any judge of probate, tax collector, county treasurer, clerk of the circuit court, or other officer paying money into the state treasury, for any amount overpaid into the treasury, by such judge of probate, tax collector, county treasurer, clerk of the circuit court, or **other officer.**"

At common law there was no principle upon which a taxpayer could recover a refund of taxes paid through error or mistake, but the Legislature has seen fit to provide, in certain cases, for a refund. (Title 51, Section 328 et seq.) It has been held, however, that the right is "a creature of legislative grace" and the taxpayer must bring himself within the terms of such statutes and comply strictly therewith in order to reclaim. (Lee, etc. vs. Cunningham, 176 So. 477, 234 Ala. 639). These refund statutes are concerned mainly with taxes paid to county or municipal officers. There are no reclaim statutes within Article 7 of Title 51 from which Section 338 is quoted, but the Section seems to, and in my opinion, does, apply to **any officer** of the state who collects revenue under Title 51 and overpays to the Treasurer. The duty of the Comptroller to draw his warrant on the Treasurer in favor of the officer overpaying is mandatory. The overpayment in this case **must** be returned to the Superintendent of Insurance.

The real question in this matter is not: Is the Insurance Company entitled to a refund for taxes voluntarily or involuntarily paid? The claim is made for the excess of the amount paid by a mistake of fact and through error. There is no attempt made to recover any taxes paid. The tax refunding statutes are inapplicable to the case. The real question is: If the Superintendent of Insurance must be repaid by the warrant of the Comptroller on the Treasurer for the amount overpaid into the Treasury, does the Company have an action at law against such officer for this excess? In my opinion it does. When the Superintendent of Insurance receives this overpayment back from the Treasurer, the taxpayer has a cause of action at law to recover the same. Otherwise, the officer would become unjustly enriched. Generally, money paid on account of a mistake of fact is recoverable. (Ala. Dig. Payment Key # 85 (1))

As you know, the State Board of Adjustment has no jurisdiction to settle or adjust claims of which the Courts of the State have jurisdiction. (Title 55, Section 334, 1940 Code.) (See also Lee vs. Cunningham, *Supra*). I am of the opinion then, in view of the foregoing, that there is a provision of law whereby the refund may be made without resort to a decree of the Board of Adjustment. In fact the Board of Adjustment should not make an award in the matter.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 12, 1944.

Hon. G. R. Swift

State Highway Director

State Highway Department

Montgomery 4, Alabama

General Acts 1943, p. 492—State Highway Department—Rules and Regulations—Cost of Right of Way—Federal Aid—

1. State Highway Department authorized to make such reasonable rules and regulations as are necessary for administration of Act No. 527, approved July 10, 1943 (General Acts 1943, p. 492) including the right to approve or disapprove the cost of right of way acquired by a county, city or town, pursuant to said act. Department may refuse to accept right of way so acquired if cost thereof deemed unreasonable or excessive.

2. Cost of such right of way includes outlays and expenses incident and necessary to acquisition if legally incurred.

3. One half of the cost of such right of way payable by the county, city or town, without regard to any federal aid that may be received by the State in connection therewith.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 10, 1944, is as follows:

"As a guide in carrying out provisions of Act 527, passed during the last session of the Legislature, to amend Section 25 of Title 23 of the 1940 Code of Alabama, it is requested that you give us your opinion on certain matters listed as follows:

- "1. Does the Highway Department have any authority under this Act to make such rules and regulations as may be deemed necessary for the administration of the act since it is required to pay one-half of the right of way costs from state funds?
- "2. What control, if any, may the Highway Department exercise in determining the amount to be paid for each parcel of right-of-way acquired by any county or municipality for Highway Department use?
- "3. Is the Highway Department required to pay only one-half of the actual cost of land acquired for right-of-way, or is it obligated to share equally with the county or municipality in payment of

incidental costs such as recording fees, court costs on right-of-way condemned, attorney's fee (where the county or municipality does not pay an attorney a regular salary for such work) and compensation to any other person hired especially to do work in connection with acquiring right-of-way?

- "4. In instances where the Federal Government participates in the cost of right-of-way to the extent of their participation in construction costs, may the Highway Department take credit for the amount of the federal participation? In other words, if the Federal Government participates to the extent of 50% in the cost of right-of-way on a particular project will the county be required to pay the other 50% or will the Highway Department be required to pay one-half of that part not paid from Federal Funds?"

State roads and bridges are constructed by the State Highway Department, or by contract with it and under its supervision. The department disburses its funds for such purposes, furnishes plans and specifications, determines the character of such roads and bridges and has "general supervision over the construction and maintenance of all the public roads, bridges and culverts in the State where the funds of the State are used, and shall have a general supervision over the expenditure of any funds apportioned to any county of the State for the construction and maintenance of all public roads, bridges and culverts in each county" Code 1940, Tit. 23, §§ 12, 13, 15.

In the exercise of these powers the department necessarily has a broad discretion, and must adopt certain policies for the effective and efficient execution of such powers. Accordingly in Section 16 and again in Section 35, Title 23, it is provided that the department may make reasonable rules and regulations for such purposes.

Such rules and regulations will necessarily include all matters necessary for the effective exercise of these powers, not inconsistent with other provisions of law regulating the department and its activities.

The right of way for such roads is to be acquired by the counties, cities and towns through which such roads are constructed. Each such county, city or town is required by law to acquire that part, parcel or portion of the right of way located therein. There is, however, no way to compel acquisition by a county, city or town, and the only effect of its refusal or failure to acquire the right of way is that the director of the department "shall have authority to acquire such right of way." In either event one half of the cost is paid by the State, and one half by the county, city or town. Act No. 527, approved July 10, 1943, (Gen. Acts 1943, p. 492).

The effect of this act is that the county, city or town, through which a state road passes, has the privilege, or option, to provide its parcel of right of way and share the expense equally with the State, (or the department). As the State, or its highway department, is equally interested with the county, city or town, in such cost or expense and must pay one half thereof out of the State highway fund set up under Section 15 of Title 23, it follows that the department should have a voice in determining what the cost shall be. If such cost, in case the county, city or town exercises its option to acquire the right of way, is excessive or unreasonable, the department may, in my opinion, refuse to accept the same, and may take such measures as it deems

necessary to acquire the right of way for its own account. This necessarily follows from the department's statutory authority of supervision of construction and general supervision over its own funds and the expenditure of such funds.

For answer therefore to your first and second questions I am of opinion that the department is authorized to make such reasonable rules and regulations as it deems necessary for the administration of Act No. 527, *supra*, including the right to withhold approval of the amount to be paid for rights of way acquired by a county, city or town, under said act, if such amount is considered unreasonable or excessive.

The act itself imposes one half of the cost of acquisition on the State. Whether the right of way be acquired by county, city or town, in the first instance, and accepted by the department, or by the department itself upon refusal or failure of county, city or town, the cost of acquisition will necessarily include all expense or outlay reasonably and legally incurred in connection therewith, such as court costs, recording fees, and attorney fees, if condemnation is resorted to and an attorney has been employed to conduct the proceedings. The State must follow the rule in such cases.

For answer to your third question I am of opinion that the department is required to pay one half of the cost of land acquired for right of way and also to share equally in payment of incidental costs such as recording fees, court costs, attorney's fees and compensation for such other services as may be necessary to acquire the right of way. Whether the services of an attorney or some other person are necessary will be a question of fact in each particular instance and no general rule or formula can be laid down applicable to all cases that may arise. If a county, city or town has an attorney whose terms of employment include such services then, of course, an attorney's fees should not be reckoned or included as a cost of acquisition. What is or is not an item of cost in any particular instance should, if possible, be agreed upon in advance between the department and the county, city or town, so as to avoid future dispute and contention.

The statute as already noted charges one half the cost of right of way against the county, city or town. This is done without qualification, and without consideration of or reference to federal aid. If the department (or the State, in other words) pays the other half of cost of right of way it is immaterial from what source the department or the State procured funds to make payment, whether it be by some form of taxation, by federal aid or grant, or otherwise. The county, city or town is not concerned with federal aid in this particular instance.

The answer to the first half of question numbered 4 is therefore "yes." And for answer to the remaining question I am of the opinion that "if the Federal Government participates to the extent of 50% in the cost of right of way on a particular project," the county, city or town will be required to pay the other half, in which case the department will not be out of pocket at all as to right of way, except as to such costs, if any, as the Federal Government may refuse to pay. Federal aid, in other words, in such cases, inures to the State itself and not to county, city or town.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 12, 1944.

Hon. S. E. Boozer

Judge of Probate

Calhoun County

Anniston, Alabama

Code 1940, Tit. 7, § 713—Newspapers of General Circulation—

A newspaper to qualify as a medium of publication for publications required by law to be made in a newspaper must be published and circulated in the county wherein publication is required to be made, for the information of the public in general as to current events of local and public interest, as distinguished from publications for the information of some particular group, class, organization trade or profession, and must otherwise comply with the requirements of Code 1940, Tit. 7, § 713.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of June 2, 1944, is as follows:

"I am writing you in reference to a bill for publishing the list of qualified electors by the Jacksonville News some three weeks before the May Primary.

"The Jacksonville News, by R. K. Coffee, the owner, published this list and bill has been sent to the County Board of Revenue for payment, and they have been waiting for some time for a ruling as to his newspaper being a newspaper of general circulation. The Jacksonville News has had a general circulation for the last eight years, and has had numerous legal advertisements in the paper for several years to my own personal knowledge, and I cannot see why there would be any question as to Mr. Coffee being entitled to his money for this publication.

"You will find enclosed letter from Mr. Coffee, part of which is personal, and I am only enclosing the part that pertains to his papers qualifications, and would appreciate your giving a ruling at an early date on this matter.

"Please return the letter enclosed with your ruling."

The list of electors required to be published under Code 1940, Tit. 17, § 38 must be published "in some newspaper with a general circulation."

All publications required by law "to be published in a newspaper must be printed in whole or in part and published in the county in which the adver-

tisement is published and must be published in a newspaper printed in the English language which has a general circulation in the county in which it is published, which newspaper shall have been mailed under the second class mailing privilege of the United States Postoffice Department from the post-office where it is published for fifty-two consecutive weeks * * *." Code 1940, Tit. 7, § 713.

In 28 Words and Phrases (Per. Ed.) p. 602, cases are cited from various other jurisdictions construing the meaning of the phrase "newspaper of general circulation." The purport of these cases is that such a newspaper is one that circulates among all classes and is not confined to a particular class or calling in the community,—publishing intelligence of passing events and news items of interest to the general public of such a character that the reading public might well look to such a paper to learn the news of current events. Such a newspaper is one published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and is to be distinguished from one devoted to the entertainment or enlightenment of some particular class, profession, trade, calling, race or denomination.

In addition to the foregoing such a newspaper, under Alabama law must as above indicated have enjoyed and exercised the second class mailing privilege for fifty-two consecutive weeks in the county where publication is required to be made.

The foregoing will serve as a sufficient guide to determine whether the Jacksonville News is such a newspaper as was qualified to publish the list of electors to which you refer. The question is one of fact which I cannot answer otherwise than as already stated. Mr. Coffee should present his claim for payment to the county governing body, supported by such proof, if proof should be demanded, as will meet the test hereinabove indicated. See also Quarterly Report, Attorney General, Vol. XXIII, p. 217.

I am returning Mr. Coffee's letter.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 13, 1944.

Hon. Sim L. Howell, Chairman

Morgan County Board of Revenue and Control

Decatur, Alabama

Counties—County Board of Revenue without authority to appropriate county funds to Chamber of Commerce, even though appropriation confines use of funds to purposes set out in Title 12, Section 12, subsection 22. Constitution of 1901, section 94. Title 55, Section 156.

Title 12, Section 12, Subsection 22—County Board of Revenue without authority to appropriate county funds to Chamber of Commerce, even though appropriation confines use of funds to purposes set out in Title 12, Section 12, subsection 22. Constitution of 1901, section 94. Title 55, Section 156.

Counties—Delegation of Authority—Authority delegated to county governing body by legislature cannot be redelegated by county board to another agency.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of May 16, 1944, is as follows:

"We are handing you herewith a certified copy of a resolution adopted by the Morgan County Board of Revenue and Control at its regular meeting of May 8, 1944, and ask that you render an opinion as to whether or not such a sum can be legally expended by Morgan County."

"APPROPRIATION TO DECATUR CHAMBER OF COMMERCE

"Mr. R. T. Harris, President of the Decatur Chamber of Commerce, and John Nelson, Secretary of the same, appeared before the Board requesting that the sum of Five Hundred (\$500.00) Dollars be appropriated by the Board for use by the Decatur Chamber of Commerce, and W. H. Meadows offered the following resolution:

"BE IT RESOLVED BY THE BOARD: That the sum of Five Hundred (\$500.00) Dollars be and the same is hereby appropriated and ordered paid to the Decatur Chamber of Commerce, to be used by it for the sole and only purpose of developing, advertising and promoting the agricultural, mineral, water and labor resources of Morgan County, and for the purpose of locating and promoting agricultural, industrial and manufacturing plants, factories, and other industries in Morgan County.

"The said W. H. Meadows moved that the foregoing resolution be adopted, and said motion was duly seconded by J. L. Rowe, and upon being put to a vote was unanimously voted for by the four members of said Board, it is therefore ordered that said resolution be adopted and that the Chairman may draw a warrant payable out of the General Fund of Morgan County in the amount of Five Hundred (\$500.00) Dollars, payable to the Decatur Chamber of Commerce, provided, however, that such an expenditure be authorized by a ruling of the Attorney General of Alabama after a submission to him of this order."

It is my opinion that the above appropriation is unauthorized and void. Reference is here made to an opinion of this office dated April 4, 1944 to Hon. Sim L. Howell, Chairman, Morgan County Board of Revenue and Control. In that opinion it was stated that appropriation by the County Board of Revenue to a Chamber of Commerce was not shown to be authorized because "it does not appear that the money appropriated will be used for the purposes set out in subsection 22, supra." That opinion concluded, "you are further advised that in the event the limitations upon the use of the appropriation are made, another question will arise which is not covered by this opinion, namely, whether the County Board of Revenue may designate a Chamber of Commerce to perform the activities listed in subsection 22, supra, in place of the County Board."

The question to be decided is: Whether or not a County Board of Revenue or County Commission can appropriate county funds to a Chamber of Commerce of a municipality located within that county, such appropriation providing that the money is "to be used by it for the sole and only purpose of developing, advertising, and promoting the agricultural, mineral, water and labor resources of Morgan County, and for the purpose of locating and promoting agricultural, industrial and manufacturing plants, factories, and other industries in Morgan County." In my opinion this appropriation by the County Board is unauthorized and void for the following reasons:

(1) To hold that Title 12, Section 12, subsection 22, Code of Alabama 1940 authorizes an appropriation as outlined above would cause said subsection to violate Section 94 of the Constitution of 1901.

(2) The resolution outlined above is an attempt to delegate authority already delegated.

(3) Expenditures made by a Chamber of Commerce could not be audited as are the expenditures of the Court of County Commissioners or Board of Revenue.

(1) Section 94 of the Constitution provides as follows:

"The legislature shall not have power to authorize any county * * * of this state to lend its credit, or to grant public money or thing of value in aid of, or to, any individual, association, or corporation whatsoever, * * * * *"

The appropriation, as shown by the above resolution, is an appropriation of public money to an association, said money to be used for certain purposes

which the county itself (the County Board) is authorized to set aside, appropriate and use for such purposes. It is to be noted that the Legislature is without power to authorize a county to grant public money to any individual, association or corporation whatsoever. In my opinion, the Chamber of Commerce of Decatur, Alabama, is an association within the meaning of this constitutional prohibition. Were subsection 22, *supra*, to be construed as authorizing a grant of public money to an association, said subsection would be unconstitutional. We must, therefore, construe said subsection in the light of this constitutional provision and if possible, place a construction thereon that does not violate the constitution. It results, therefore, that the appropriation is unauthorized.

(2) The maxim **delegatus non potest delegare** applies to counties and county governing bodies. 20 C. J. S., page 82, section 89. It is to be noted that the county has the authority to set aside, appropriate and use county funds for the enumerated purposes, and not the Chamber of Commerce or any other association. Title 12, Section 12, subsection 22, Code of Alabama 1940. The power to appropriate and to use county funds for those purposes set out in subsection 22, *supra*, has been delegated to the county by the legislature. That power cannot be delegated by the county to some other body.

"The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee, or to an agent, an employee, or a servant."

20 C. J. S., page 862, section 98.

It is my opinion that the power of appropriation and use of county funds involves the exercise of judgment and discretion and are not purely ministerial and that, therefore, the power delegates to the County Board cannot be redelegated to another agency. For this reason, therefore, the appropriation is unauthorized.

(3) The examiners of public accounts are required "to examine and audit the records and accounts of all state and county offices, bureaus, boards, commissions, institutions and departments, as now provided by law or which may hereafter be provided by law." I find no provision of law whereby examiners of public accounts could audit the books and records of a Chamber of Commerce. It is the duty of the County Board to determine that the expenditures of an appropriation made under the authority of subsection 22, *supra*, are used for the purposes outlined in said section. If the actual expenditure of money above appropriated were under the sole control of the Chamber of Commerce, it would be impossible for examiners of public accounts to determine whether the money is used solely for the purposes enumerated in subsection 22, *supra*, or not. (See letter to Hon. G. H. Howard, Probate Judge, Elmore County, October 11, 1943.)

We are not unmindful of the fact that the Chamber of Commerce per-

forms a valuable service to the community and to the State by working to develop, advertise and promote all the resources of the State. However, the desirability of county financial aid in this service has no bearing upon the legal authority of the county to make a financial contribution.

For the reasons enumerated above, I am unable to approve the resolutions above set out.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 13, 1944.

Hon. Fred Nunnally

Chairman, Calhoun County Commission

Anniston, Alabama

Acts 1943, page 578—Insane Persons—Removal to State Hospital for Insane—

Counties are liable for payment of the fees and allowances (or mileage) payable to the Sheriff under Act No. 575, approved July 7, 1943 in cases where the Sheriff is deputed under Code 1940, Tit. 45, § 211 to convey an insane patient (not charged with crime) to a state hospital for the insane after adjudication of insanity under Code 1940, Tit. 45, § 210, or Tit. 15, § 432, whether such patient be indigent or solvent.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of May 22, 1944, is as follows:

"Your official opinion is requested as follows:

"Does Act No. 575, General Acts of 1943, page 578, require the County to pay the fees and mileage provided therein where an insane person is not also charged with some crime regardless of whether such person is indigent.

"It is my understanding from your previous opinions that this act does not apply to those persons of unsound mind who are otherwise prisoners and also that it applies only where the Sheriff or one of his

deputies is deputed by the Probate Judge to transport the insane person to the State hospital. The question that arises in my mind is whether the County is liable for the payment of all of the other cases or only in the case of indigent persons."

Persons may be taken and admitted to state hospitals for the insane either as patients for care and treatment, or as insane criminals, whether charged or convicted of crime, or acquitted thereof by reason of insanity.

Patients, so-called, whose confinement is in no wise connected with a charge of crime, are classed as indigent or paying patients. Code 1940, Tit. 45, §§ 212, 213, 214. They are admitted after a hearing, or inquisition of lunacy, before the Judge of Probate, authorized by Tit. 15, § 432, Tit. 45, §§ 208, 210.

Such hearings are essentially judicial proceedings, and if it be determined that the person brought before the judge of probate is insane to the extent entitling him or her to admission to the hospital (Tit. 45, §§ 204, 205) a "certificate of mental disqualification," in prescribed form, is made out under Section 210. Whereupon the judge of probate "shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital." Tit. 45, § 211.

Before enactment of Act No. 575, approved July 7, 1943, (Gen. Acts 1943, p. 578), only the expenses of conveying indigent patients to the hospital were payable by the county. No provision was made apparently for paying such expenses for other or "paying" patients, although the judge of probate may have "deputed" the Sheriff in his official capacity to convey the paying patient to the hospital.

It would seem therefore that Act No. 575, supra, was passed for the purpose of both fixing and limiting the sheriff's compensation for services in arresting or taking into custody and conveying all patients to the hospital, whether indigent or solvent, in case the judge of probate, under said Section 211, sees fit to depute the sheriff for that purpose.

Had the legislature intended to limit the sheriff's fees and mileage charges, as claims against the county, to the cases of indigent insane persons, such limitation or restriction could easily have been expressed in the act itself. It cannot be read into the act by construction, or inferred from the fact that when the act was passed the expense of taking insane patients to the hospital was chargeable to the county for indigents only. To restrict the Act in question to indigents would do violence to its plain and unambiguous terms. There is no basis for so doing.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 15, 1944.

Hon. Roy Johnson

Tax Assessor, Jefferson County

Birmingham, Alabama

TAXATION—

TAXATION OF EQUITABLE RIGHTS—

1. A vendee in possession of land under an executory contract of sale is the owner of the land for the purpose of taxation under Code 1940, Tit. 51, § 21.

2. One in possession of land under equitable right, claim or title is the owner of land for the purpose of taxation under Tit. 51, § 21 of the Code.

3. Code 1940, Tit. 51, § 21 does not authorize state taxing authorities to levy a tax on the interest of such owners in the land, except in cases where the ownership is by a person other than the owner of the surface or soil of the land.

4. Land itself held as above indicated must be assessed against such owners according to its reasonable and fair market value by state taxing authorities and they have no authority to take into consideration the value of the interest of such owner in the land in arriving at its taxable value against such owner.

5. Vendors under executory contracts of sale or holders of mere naked legal title where the equitable title is held by another are not the owners of the land for the purpose of taxation, and the land is not assessable as their lands.

6. Federal courts have no jurisdiction to interfere with state subjects of taxation or its methods of ascertaining or arriving at valuations of the land unless such state procedure violates the Constitution of the United States.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

We are in receipt of your letter of June 1, 1944, dealing with Ken Realty Company against you, heretofore instituted in the United States District Court at Birmingham. You called attention to an opinion of this office, rendered to you, 24 Quarterly Report Attorney General, pages 105-108, as to the assessment of property against Ken Realty Company. Your letter asks no further or extended opinion of this office on the questions considered in our former opinion. You seem to be of the opinion that the Circuit Court of

Appeals of the United States held that our former opinion was erroneous, and, in confirmation of this fact, you say, "of course, we will have to follow the court's ruling in this case and collect only on the 60% value in proportion to the amount of the money they have paid on the purchase price."

The only question you ask is with reference to like or similar sales by the United States to hundreds of other parties in your county.

Of course, if you are going to follow what you think the Court of Appeals held there will be no reason for any further opinion in such like cases. We respectfully suggest that you are mistaken as to the holding of the Circuit Court of Appeals. The former opinion of this office in this matter held that the real property purchased by the Ken Realty Company from the United States under an executory contract providing that the title should pass to Ken Realty Company when all the purchase money was paid was taxable against the Ken Realty Company as owner under the taxing laws of Alabama. You followed that opinion and levied the assessment on the lands formerly purchased by the Ken Realty Company as the property of the Company. Ken Realty Company filed in the United States District Court a complaint assigning this assessment as illegal, alleging several reasons therefor. You, through State's counsel, filed a motion to dismiss the suit. The District Court at the hearing held that the assessment was legal and rendered a final decree dismissing the case out of court. From this decree the Realty Company took an appeal to the Circuit Court of Appeals and that court held that the assessment was legal, and rendered a decree affirming the decree of the District Court dismissing the suit, leaving nothing to be done by the court below. This ended that suit, and left open to the Realty Company nothing but the right to appeal to the Supreme Court of the United States, but no appeal was taken.

If there is any way of ending a case and getting it out of court, this case went out and beyond the jurisdiction of the federal court.

In writing the opinion in the Circuit Court of Appeals, which is no part of the judgment, the court, by way of argument said:

"We are convinced that the Ken Realty Company has a taxable interest whose value is measured each tax year by the value of the whole property diminished by the amount of unpaid purchase money." (138 Fed. 2d. 809, 812.)

The Court did not undertake to incorporate this thought into its decree, but by its decree simply said:

"Since the appellant by its petition does not show itself entitled to the injunction or to the declaration for which it prays, the judgment of dismissal is affirmed." (*Italics ours*—38 Fed. 2d. 809, 812.)

If the Circuit Court of Appeals had intended that this fantastic theory of assessment should be enforced it would have sent the case back to the United States District Court with instructions with reference thereto, and held the case in court instead of dismissing it out of court. Such a procedure would have been the usual course where cases are desired to be held for

further consideration. The Realty Company and its counsel became obsessed with this idea of assessment suggested by the Court of Appeals, and undertook to get the case back into court by filing a motion against you in the District Court of the United States, wherein it presented this idea and method of assessment. This office appeared for you on the hearing before the District Court on May 31, 1944, on this motion. We filed a motion to dismiss the plaintiff's motion assigning several grounds, chief of which are:

First, that the original cause had been dismissed out of court on its merits by the affirmance of the decree of the district court by the Circuit Court of Appeals, and that the court was without the jurisdiction to entertain the plaintiff's motion.

Second, that the Federal Court was without jurisdiction to determine the methods of levying and collecting taxes or to prescribe the methods or standards of arriving at the value of property to be taxed by the State except in cases where some provision of the United States Constitution is violated. We argued these propositions to the court, and at the close of the State's argument the court recessed until a later hour of the day. During the recess counsel for the Realty Company approached the State's council and proposed to dismiss the plaintiff's motion if the Attorney General's office would give an opinion on your request that an assessment of the interest of the Realty Company in the property involved was legal. We agreed to do this with the distinct understanding that such an opinion should have no effect on assessments already made final by the taxing authorities, and that it should have no bearing on the arriving at the valuation of the property.

We further suggested, however, that this form of assessment that was proposed was not the only form to be used, but that the assessment could be made against the property itself without any reference to interest of the Realty Company. This agreement was made known to the court in open court. The court adjourned the hearing on the motion to await such an opinion.

As your letter involves questions as to the assessment of the property of Ken Realty Company which will arise annually for six or seven years, and the same questions will arise with reference to hundreds of other like cases in your county, we shall now set forth applicable and controlling principles of law.

It is the settled law of this country that the power to tax is an inherent attribute of sovereignty, and is not the creature of constitutional or legislative enactments. It already was when state constitutions and legislative enactments were made. It necessarily follows from this incontestable principle that the state may levy a tax on the property of its citizens or only on certain property, and in any manner it deems satisfactory unless inhibited by the state or federal constitution. These principles are so ancient, well-known, and firmly embedded in our jurisprudence that we will not stop to cite the authorities.

From these principles it logically follows that the state is not required to levy a tax on all property or interest in property. It may exempt some; it may tax only real property, or only personal property, or it may tax both kinds of property. Under these principles it may classify the property to be

taxed. **Opinion of the Justices**, 234 Ala. 358; **Phoenix Carpet Company v. State**, 118 Ala. 143, 150-1; 61 C. J. (Statutes) page 552, Sections 674-675.

The State of Alabama has adopted a very elaborate system of taxation. **Code 1940**, Title 51, Sections 1-913. An examination of this system shows that the tax is levied sometimes against the person, his business or profession, sometimes on personal property and also a direct tax, not on the person but upon the real estate of the owner of such property. We are concerned with the latter selection. **Code 1940**, Title 51, Section 21 so far as is here important reads as follows:

"The subjects of taxation, except as exempted by law, shall be as follows: (a) Every piece, parcel tract, or lot of land in this state, including therein all things pertaining to such land and all structures and other things so annexed or attached thereto as to pass to a vendee by conveyance of such land; * * *

It is convincingly clear from this quotation that the tax is to be laid on real property, and there is no mention, either expressly or impliedly, that the levy is to be made against the interest of some party in such property, but the assessment is to be made on the land itself as a whole. These provisions relate to a direct property. **Phoenix Carpet Company v. State**, 118 Ala. 143, 150.

Our Supreme Court removes this question beyond the field of argument. It says: "It is well settled that when a vendee of real property is in possession under an executory contract of sale he is liable to be taxed as the owner." (Italics ours). **Crow, Tax Collector, v. Outlaw**, 225 Ala. 656, 657; **White Furniture Company v. State**, 206 Ala. 575. This latter case made this statement but quotes from a well recognized authority: "Assessments in the name of a person as owner who holds the equitable title to property and is in possession have been generally upheld as valid." (Page 576.)

This opinion made the further statement:

"So, when a statute requires that property be assessed to the owner, we think it means the general and beneficial owner—that is, the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership—and not the person whose interest is primarily in the enforcement of a collateral pecuniary claim, and does not contemplate the use or enjoyment of the property as such."

These cases clearly show without equivocation that the court construes the above-quoted provisions of Section 21, Title 51, of the Code as making the vendee in possession of land under an executory contract of sale the owner of the land for the purpose of taxation, although the legal title remains in the vendor

These cases further show that any person who holds the equitable title to the property and is in possession is within the taxing statute the owner of the land for the purposes of taxation. And these cases make it clear that in such circumstances the land is not subject to taxation as the lands of the vendor or holder of the legal title. It is not the policy of the taxing law to make a double assessment on lands. It is true, as a legal proposition, that

the legislature had authority to provide for assessment of the vendor's interest and the interest of the vendee also, but it does not do so.

The above-cited Alabama authorities are supported by the Supreme Court of the United States. **Central Pacific Railroad Company v. Nevada**, 162 U. S. 512; **Maish v. Arizona**, 164 U. S. 599; **Northern Pacific Railway v. Myers**, 172 U. S. 589; **Baltimore Ship Building Company v. Baltimore**, 195 U. S. 375; **New Brunswick v. United States**, 276 U. S. 547.

These cases show that the assessments were made on the land itself and not against the interest therein of the taxpayer, but as his lands. The assessments were held to be valid.

Our taxing statute as to real estate makes it plain that the tax is a direct ad valorem tax. This means according to the value of the property taxed,—**Second Words and Phrases**, Permanent Edition, pages 507-509.

The Code of Alabama, Title 51, Section 17, provides that:

"All taxable property within this State shall be assessed for the purpose of taxation at 60% of its fair and reasonable market value." Section 18 of this same title provides:

"The rate of taxation for state purposes shall be .65 of one percent per annum on the assessed value of the taxable property within this state."

Section 46 of this same title declares that for the purpose of assessment, real and personal property shall be estimated at its fair and reasonable market value.

Section 55 of this same title requires that the tax assessor, on failure of the taxpayer to return a list of his property for taxation, ascertain the fair and reasonable market value of the taxable property.

The Board of Equalization, at its hearing, is required to ascertain the fair and reasonable market value of property. **Code**, Title 51, Section 107. This same idea runs through the whole system of the taxation of real property.

It may be well to state for your information and guidance, that there is no principle of law more firmly established by the Supreme Court of the United States than this, that the federal courts are without jurisdiction to determine the methods of levying and collecting taxes or to prescribe the methods or standards of arriving at the standard of value of the property to be taxed by the state, except in cases where some provision of the United States Constitution is violated, and they will not interfere with the methods of taxation and the mode of arriving at valuations prescribed and followed by state taxing authorities. **Witherspoon v. Duncan**, 4 Wall. 210; **Lewis v. Monson**, 151 U. S. 545, 549; **Arkansas Commission v. Thompson**, 313 U. S. 132; **Great Lakes v. Huffman**, 319 U. S. 293; **Elder v. Wood**, 208 U. S. 226.

The Supreme Court of the United States has also held that such matters do not present a federal question. **New Brunswick v. U. S.**, 276 U. S. 565, 566;

Central Pacific Railroad v. Nevada, 162 U. S. 512, 527; **Arkansas Commission v. Thompson**, 313 U. S. 132, 145.

Our taxing statute expressly provides that no attempt is made to levy an assessment on property, agencies, or instrumentalities of the United States. Code, Title 51, Sections 2 and 22.

The United States Supreme Court has held that such provisions, as Sections 2 and 22, *supra*, are unnecessary; that unless the taxing statute expressly shows that the purpose is to tax government property or instrumentalities it will be presumed that there is no intention to tax it. **Van Brocklin v. Tennessee**, 117 U. S. 151, 171.

It follows from the foregoing authorities, cited in this opinion that it is the duty of the taxing authorities of Jefferson County, under the law to levy an assessment on the real estate itself as a whole purchased by Ken Realty Company from the United States, against the Realty Company as the owner of such land; that the land must be assessed at its fair and reasonable market value at the rate of 60% of such market value. No other method can be lawfully followed except that here prescribed by the taxing statute, as construed by the Supreme Court of Alabama, herein cited. It is also equally clear that the taxing authorities have no authority to levy an assessment on the mere interest of the Ken Realty Company therein. Neither you nor the taxing authorities have any authority to take into consideration the value of the vendor's interest in the land in arriving at the fair and reasonable market value of the lands required under law to be taxed against Ken Realty Company. These statutes are mandatory, and the taxing authorities cannot substitute their judgment therefor.

It is hardly necessary to add that this opinion applies, not only to Ken Realty Company, but to all other parties under like conditions.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 16, 1944.

Hon. A. A. Smith, Deputy Solicitor

Geneva County

Hartford, Alabama

Justices of Peace—Traffic Violations—Jurisdiction—Title 13, Section 424, Code 1940—

When a defendant is brought before a justice of the peace charged with the offense of driving while intoxicated and demands a trial by jury, and posts the required bond, as provided by Title 13, Section 424, Code 1940, the case is automatically transferred to the Circuit Court, and the justice of the peace loses all jurisdiction over same.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of May 17, 1944, is as follows:

"The writer is Deputy Solicitor for Geneva County, and as such official I would like to have your opinion on a matter of criminal procedure.

"Title 36, Sections 1-58 are the rules of the road and are criminal statutes regarding the use of the highways in Alabama. In Pharr vs Whittle, 185 So. 895, 237 Ala. 124, the Supreme Court held that Justices of the Peace had final jurisdiction for violations of the rules of the road.

"Title 13, Section 424, of the Code of Alabama of 1940 provides for a demand for a jury trial in Justice of Peace courts. This statute has been construed to the effect that, if such demand is filed, the trial cannot proceed in the Circuit Court without indictment unless the statute denies to the defendant the right to demand an indictment. Reports of the Attorney General 1936-38, Page 370.

"Some officers claim there has been a change in this procedure, and therefore I would like to submit a specific proposition for your opinion:

"If a man is charged before a Justice of Peace for driving while intoxicated and demands a trial of the cause by jury, what disposition should be made of the case? Must the case go to the grand jury docket, or is there some other procedure to be followed?

"I will appreciate your immediate advice on this question."

Justices of the peace have final jurisdiction for violations of the rules of

the road committed in their respective precincts. **Pharr v. Whittle**, 237 Ala. 124, 185 So. 875. Biennial Report of Attorney General 1936-38, page 275. Having final jurisdiction of an offense the justices of the peace must proceed with the case unless his right to conclude the case is interrupted in the mode and manner prescribed by law.

Title 13, Section 424, Code of 1940, is as follows:

"§ 424. Proceedings when defendant demands trial by jury.—If the defendant demands a trial by jury, he must be required to enter into bond, with good sureties, conditioned for his appearance at the next session of the circuit court of the county to answer the charge; and, failing to give such bond, must be committed to the county jail until the next session of the circuit court having jurisdiction of the offense, unless he elect, in the meantime to perform hard labor for the county as provided by law."

Section 424, *supra*, was considered by this office in an opinion rendered to Hon. H. H. Kinney, Judge of Probate, Cullman County, Alabama, under date of November 12, 1941, (Quarterly Reports Attorney General, Volume XXV, page 137). In this opinion it was held that when a criminal case is brought before a justice of the peace of which he has jurisdiction, and the defendant demands a trial by jury under Code 1940, Title 13, Section 424, and presents to the court a proper bond, the case automatically goes into the circuit court and any further order made by the justice of the peace is without authority of law and void.

This opinion was based upon the following Alabama cases: **Streanger v. State**, 21 Ala. App. 600, 110 So. 559; **Elmore v. State**, 24 Ala. App. 368, 137 So. 462, **Pittman v. State**, 18 Ala. App. 447, 93 So. 42.

The general rule is that when a case reaches the Circuit Court the only process by which the prosecution may continue is by indictment by a grand jury. **Streanger v. State**, *supra*. For an exception to this general rule, which exception is not pertinent to the instant case, see **Collins v. State**, 218 Ala. 250, 118 So. 265. See also Quarterly Reports Attorney General XXXII, page 79.

It is therefore my opinion that the question asked by you must be answered in the affirmative, and the case should be placed in the Grand Jury docket.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 19, 1944.

Hon. J. W. Brock

Chairman Commissioner's Court

Coffee County

Elba, Alabama

Title 11, Section 29, Title 12, Sections 5 and 28 (as amended by Act No. 662, Gen. Acts of Alabama 1943, page 1049), Code of 1940—Coffee County—Judges of Probate—Court of County Commissioners—Costs and Fees.

Title 11, Section 29, Code of 1940, prescribing the sum of \$3.00 per day for the judge of probate in the discharge of his duties in presiding over the court of county commissioners is the authority by which the judge of probate is paid for the discharge of such duties, rather than Title 12, Section 28, Code of 1940 (as amended by Act No. 662, Gen. Acts of Alabama 1943, page 1049), providing for the payment of \$4.00 per day to the members of the court of county commissioners for the discharge of their duties as such members.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of May 24, 1944, is as follows:

"Acting under authority of Section 28, Title 12, of the Code 1940, (Cumulative Pocket Part), and being guided further by Section 5, Title 12, of the same Code; also opinion of the Attorney General reports page 709, Biennial Report 1928-30, and an opinion as recorded on page 729 of the 1934-36 reports, I, as Judge and as a member of the Commissioners Court, have been paid \$4.00 per day for attending Commissioners Court meetings, and discharging the duties as a member of said Court.

"A question has arisen as to the legality of this \$4.00 per day paid by the County to me as member of the Commissioners Court. I would like for you to render me an opinion at the earliest possible date on this question."

It is my opinion that the Judge of Probate of Coffee County, when presiding over the Court of County Commissioners, is entitled to the sum of \$3.00 per day while acting in such capacity.

Title 12, Section 28, Code of 1940, as amended by Act No. 662, General Acts of Alabama 1943, page 1049, provides that each member of the county governing body shall be paid the sum of \$4.00 per day while occupied in the discharge of his duties as such member.

However, Title 11, Section 29, Code of 1940, in prescribing the fees of the judge of probate, provides that he shall receive \$3.00 per day for presiding in the court of county commissioners and keeping the minutes of such court.

In the case of *Swindle v. Long*, 224 Ala. 55, 139 So. 87, it was observed by the Supreme Court of Alabama that the authority by which the judge of probate received his per diem allowance for attending the meetings of the court of county commissioners was Title 11, Section 29, Code of 1940 (then Section 7285, Code of 1923), rather than Title 12, Section 28, Code of 1940, as amended (then Section 6771, Code of 1923).

Therefore, under the reasoning applied in the *Swindle* case, *supra*, it appears that although Title 12, Section 5, Code of 1940, expressly makes the judge of probate a member of the court of county commissioners, Title 11, Section 29, Code of 1940, specifically prescribing the sum of \$3.00 per day for the discharge of his duties as such member, rather than Title 12, Section 28, Code of 1940, as amended is the statutory authority by which he is paid.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 20, 1944.

Hon. Stewart J. Lloyd

Asst. State Geologist

Geological Survey of Alabama

University, Alabama

Title 55, Section 104, Code of Alabama 1940—Act No. 645, General Acts of Alabama 1939, page 1009—Appropriations—Funds—State Oil and Gas Board.

The balance remaining in the "Oil and Gas Fund" at the end of the fiscal year does not revert to the general fund of the State.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of May 27, 1944, is as follows:

"On October 17, 1940, you sent us an opinion which stated that the balance of the 'Oil and Gas Well Permits fund' remaining at the end of

the fiscal year would not revert to the general fund.

"The state is now receiving revenue from the producing wells, in Choctaw County, and Mr. Heck is keeping this in a separate fund called the 'Oil and Gas Fund.' This money also is to be spent under my supervision, and I am anxious to know if the balance remaining in it at the end of the fiscal year is carried over as is the 'Permit' fund.

"This second fund should grow quite large, as time goes on, and production increases, so that its disposition is important."

It is my opinion that the balance remaining in the "Oil and Gas Fund" at the end of the fiscal year does not revert to the general fund of the State Treasury.

The statute providing for the reversion of certain funds is set forth in Title 55, Section 104, Code of Alabama 1940, which Section is in pertinent part as follows:

"All unencumbered balances of all appropriations shall revert to the state treasury at the end of each fiscal year and to the credit of the general fund or the special fund from which the appropriation or appropriations were made.* * *

The "Oil and Gas Fund" was created by Act No. 645, General Acts of Alabama of 1939, page 1009, and consists of the proceeds from the levy of two per cent on the gross casinghead value of the crude petroleum oil or natural gas produced in the State of Alabama, which levy is made under Section 13.2 of said Act. Section 13.8 of the Act establishes the fund and prescribes the manner in which it may be expended as follows:

"Section 13.8. All moneys to collected shall be paid into the State Treasury and there kept separate from other State funds in a fund to be known as the 'Oil and Gas Fund'. Such 'Oil and Gas Fund' shall be expended by the Oil and Gas Supervisor, with the approval of the Governor, only for effectuating the purpose of this act."

In as much as this levy of two per cent is collected and placed into the "Oil and Gas Fund" for the sole purpose of defraying the expenses connected with the administration and enforcement of said Act No. 645, it is my opinion that it is not such an appropriation as is contemplated by the provisions of Title 55, Section 104, Code of Alabama 1940, supra, and, therefore, the balance remaining in said fund at the end of the fiscal year does not revert to the general fund of the State.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 20, 1944.

Hon. Norvelle R. Leigh, Jr.

Judge of Probate

Mobile County

Mobile, Alabama

Filing Tax—Decrees—Code 1940, Tit. 51, § 618—

A decree of a court upon final settlement of an estate divesting title to property held by a testamentary trustee and vesting same in the beneficiaries of the testamentary trust is subject to the deed filing tax (Code 1940, Tit. 51, § 618).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of June 13, 1944, is as follows:

"In Volume 30, Quarterly Report of the Attorney General of Alabama, page 45, I find an opinion under date of February 2nd, 1943, addressed to the Honorable H. R. Howze, Judge of Probate, Jefferson County, Alabama, which may or may not be applicable to a decree which has been filed for record in my office. A copy of the decree is herewith enclosed.

"The nineteenth paragraph of the last will and testament of James T. Peterson provides as follows:

"**'NINETEENTH.** My said Executor shall file an account in court once each year, showing the assets of the estate and the income therefrom, and after the payment of the several bequests hereinabove named, the legacies especially provided for, and the expense of administration and management, the balance shall be constituted a special fund for the following purposes:

"**'That my estate, except for the payment of the bequests and legacies hereinabove mentioned, shall remain intact for twenty years, after which time it shall be divided, share and share alike, among Laurretta Peterson Carter, James Peterson Hall, James Peterson Dixon, James Harney Woods, Virginia Irene Carter, Ellen Page and Adele Mathews, the legatees named herein, and after the expiration of the said twenty years there shall be a final settlement to wind up the affairs of my estate; provided further that in the event of the death of any of the legatees named in this the 19th paragraph of my last will and testament, the share which such deceased legatee or legatees would have taken is to revert to my estate, and is to be divided among those of my legatees who are living after the expiration of the said twenty years.'**

"The Peterson trust was administered by The First National Bank of Mobile for twenty years in accordance with the will and the Bank is now making distribution of the assets of the estate to the six beneficiaries who have survived the period of twenty years.

"You will note the decree of the Circuit Court confirms a drawing of six separate parcels made by the beneficiaries of portions of the estate. These parcels comprise real estate, bonds and personal property and are valued, respectively, at \$14,406.92, \$14,745.00, \$14,169.00, \$13,972.00, \$12,709.00, and \$13,003.60. The decree ordered the Executor to pay out of funds of the estate in addition to the value of each parcel an amount great enough to make each allotment \$15,000.00 in value. There are other monies of the estate and such other monies have been distributed to the beneficiaries direct under the nineteenth paragraph of the will.

"It is the contention of the solicitors for The First National Bank of Mobile no deed filing tax is due to be paid. They contend the real estate and personalty vested in the six beneficiaries under and by the terms of the last will and testament of James T. Peterson, deceased, and that the decree merely confirms the will.

"If, however, you rule a deed filing tax is due to be paid, am I not correct in thinking such tax should be limited to five-sixths of the value of each interest as it is shown in the decree before any money is added to the interest to bring it up to \$15,000.00? The interlocutory order or decree directed The First National Bank, as Executor and Trustee, to add to the value of each parcel an amount sufficient to make it \$15,000.00, but inasmuch as this is a distribution of money similar to that made by the Bank regardless of the decree, I can not see that any deed filing tax is collectible on the money ordered paid to make each allotment \$15,000.00 in value. If my interpretation is correct the value of the parcels totals \$83,005.52, and in no event should a deed filing tax be collected on a sum greater than five-sixths of that amount, or \$69,171.27.

"The estate has been administered in the Chancery Court for twenty years. The solicitors for The First National Bank of Mobile, as Executor and Trustee, and the beneficiaries make this distinction between the circumstances presented in this case and those presented in that submitted you by Judge Howze: There the tenants-in-common were parties to a suit for partition of land held by them in common so that it might be said the decree of partition is a result of some act on their part; in the instant case the court acted on its own volition and made division of so much of the properties without the necessity of the institution of any suit on the part of the beneficiaries.

"No consideration passes from the beneficiaries to the Bank because the beneficiaries take under the nineteenth paragraph of the last will and testament of James T. Peterson, which was quoted at the outset of this letter."

From the foregoing and a copy of the decree submitted therewith it appears or may be assumed that in and by his will Peterson created a trust for accumulation of his residuary estate for a term of twenty years for the

use and benefit of seven named persons, or their survivors at the end of the term, and that the First National Bank of Mobile has during said term, as Trustees, held and managed the trust estate.

Until the end of the term it could not be known with any certainty who the ultimate beneficiaries, entitled to division and distribution of the trust estate, would be, and during the entire term the trustee held the legal title to all property constituting the estate and to the accretions, rents, issues and profits thereof, under the terms and conditions of the will itself. The utmost right or interest of the beneficiaries originally named, or their survivors, was at the end of the twenty-year term, to call on the trustee for an accounting and distribution of the estate.

The operation and effect of the aforementioned decree was to divest the legal title of the trustee and vest the same in the six surviving beneficiaries by vesting in each of them legal title to approximately one-sixth part in value of property theretofore constituting the trust estate, specifically described.

It is well settled that legal title to property may pass by decree as well as by devise, descent or conveyance. The decree therefore comes within the influence of Code 1940, Tit. 51 § 618 as an "instrument of like character," to a deed or bill of sale, conveying real or personal property in this State, and as such is subject to the so-called deed filing tax imposed by said § 618.

Prior to rendition of the decree the surviving beneficiaries had merely a right to an accounting and distribution by the trustee of the trust estate—an equitable right. By the decree legal title has been vested in them. An instrument so operating is subject to the tax. **Hawkins v. Pure Oil Co.** 232 Ala. 660, 169 So. 307; **Quarterly Reports, Attorney General:** Vol. I, p. 117, Vol. VI, p. 106; Vol. VIII, p. 132.

It remains to be said that the amounts of money directed to be paid under the decree by the trustee to the beneficiaries to equalize the values of their respective shares, should not be considered in calculating the tax; and that the tax be measured by the total value of the six shares of property described in the decree, title to which has passed by virtue of the decree from the trustee to the beneficiaries in severalty.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 20, 1944.

Hon. Shelby Y. Moon

Clerk and Register of Circuit Court

Clay County

Ashland, Alabama

Costs and Fees—Court Costs—Costs payable in Circuit Court in juvenile cases on appeal from Juvenile Court. Title 51, Section 20. Title 13, Sections 266, 351, 359. Title 11, Section 27.

Juvenile Court—

Costs on appeal and trial de novo in Circuit Court. Title 51, Section 20, Title 13, Sections 266, 351, 359. Title 11, Section 27.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of April 24, 1944, is as follows:

"I have a case in Circuit Court, in equity, in which the question of costs, generally, arises.

"A child charged with Delinquency, after trial in the Juvenile Court of Clay County, is declared a Ward of the State; appeal is taken to the Circuit Court, in Equity, where the case is tried, resulting in a decree of Delinquency.

"In Quarterly Report of the Attorney General, Vol. XXXII, July-September, 1943, page 92, I find an opinion on Sheriff's fees in such cases, but find no opinion or law governing the following costs:

"Please give me an opinion on the following costs:

"1. Does a \$3.00 Trial Tax attach in this case? If so, from whom should it be collected?

"2. Is the Court Reporter's fee of \$5.00 to be collected?

"3. Is a Solicitor's fee to be collected?

"4. Are witnesses entitled to fee for their service? If so, under which schedule of fees (civil or criminal)?

"5. Is the Register entitled to fees for services as in other Equity cases?

"6. In case the child is discharged, are the Register's and witness fees chargeable to the General Fund of the County.

"Answer to question numbered 6, above, is desired as I have another Delinquency case pending which might result in the child being discharged."

It is my opinion that when a juvenile case is appealed to the Circuit Court, Sitting in Equity, under the provisions of Title 13, Section 362, Code of Alabama 1940 that:

(1) The three dollar trial tax should be charged as costs. Title 51, Section 20, Code of Alabama 1940.

(2) The court reporter fee of five dollars should be taxed. Title 13, Section 266, Code of Alabama 1940.

(3) A solicitor's fee should not be taxed. Title 13, Section 359, Code of Alabama 1940.

(4) Witnesses are entitled to fees under the schedule of fees for civil cases.

(5) The register is entitled to fees for services as in other cases. Title 11, Section 27, Code of Alabama 1940.

(6) In case the child is discharged the register's and witnesses' fees are chargeable to the general fund of the county. Title 13, Section 351, Code of Alabama 1940.

1. Title 51, Section 20, Code of Alabama 1940 provides that:

"Trial tax of three dollars is imposed in each case, civil, criminal and equity, which is docketed in any circuit court in this state, to be taxed and collected as other costs. * * * *"

It is my opinion that a juvenile court case on appeal in the circuit court in equity is a "case docketed" within the meaning of Section 20, supra, and the trial tax should be imposed and collected as costs. (Of course, when the county pays such costs the trial tax cannot be collected. Reports of Attorney General, 1936-38, page 369.)

2. Title 13, Section 266, Code of Alabama 1940 provides:

"In all cases reported by an official court reporter, there shall be taxed as part of the cost in the case, a fee of five dollars for each day, or a fraction thereof, that such reporter shall be engaged in reporting a case, to be collected as costs as in other cases, and, when collected, paid by the clerk of the court into the county treasury of the county in which the case is tried."

I find no provision of law excepting juvenile cases on appeal from the provisions of this section, and, therefore, the costs should be charged.

3. Title 13, Section 359, Code of Alabama 1940 provides:

"It shall be the duty of such solicitor to render such assistance when so requested, and said solicitor shall represent the state in all cases arising under this chapter appealed from the juvenile to the circuit court. * * *."

In this section there is no provision made for a solicitor's fee and since the law of costs and fees is strictly construed there is no authority for taxing same.

4. Witnesses before the circuit court should receive their fees as prescribed for witnesses in civil cases. It should here be noted that a juvenile case, wherein a child is adjudged a delinquent and a ward of the state, is not a criminal proceeding. Title 13, Section 378, Code of Alabama 1940. The court hearing such juvenile case is without authority to adjudge the child guilty of a crime. Title 13, Section 378, Code of Alabama 1940. For that reason, therefore, the fees of witnesses should be charged as such fees are charged in civil cases.

5. It is my opinion that the register is entitled to fees for services rendered in an appeal from juvenile court as in other equity cases. Title 11, Section 27, Code of Alabama 1940.

6. If a child is discharged upon the appeal to the circuit court, the register's fees and the witnesses' fees are chargeable to the general fund of the county. It has been held that the State is not liable for the costs if the case is dismissed in the circuit court for want of prosecution. 2 Quarterly Reports of Attorney General, page 10. If the child is discharged, there is no theory by which such child can be taxed with the costs and it is my opinion that the costs should be paid by the county pursuant to Title 13, Section 351, Code of Alabama 1940, which concludes as follows:

"* * * All expenses necessary or appropriate to the carrying out of the purposes and intent of this chapter, and all expenses of maintenance and care of children that may be incurred by order of the court in carrying out the provisions and intent of this chapter shall be valid charges and preferred claims against the county and shall be paid by the county treasurer when itemized and sworn to by the creditor or other persons knowing the facts in the case, and approved by the judge."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 21, 1944.

Hon. O. L. Andrews, Clerk

Circuit Court

Tenth Judicial Circuit of Alabama

Jefferson County

Birmingham, Alabama

Costs and Fees—Inferior Courts—Appeals—Corrections and Institutions—Title 45, Sections 69 and 70, Code of Alabama 1940,—Local Acts of Alabama 1919, p. 121.

1. Where a mistrial is followed by a trial in which the defendant is convicted and sentenced to the penitentiary or to hard labor, those items of costs enumerated in Title 45, Section 69, Code of 1940, except the fee for issuing capias or warrant, accruing in both trials, are payable from the convict fund.

2. Where an appeal is taken from the Jefferson County Court of Misdemeanors to the Circuit Court, and defendant is convicted and sentenced to the penitentiary or to hard labor, those items of costs enumerated in Title 45, Section 69, Code of 1940, which accrued in the Jefferson County Court of Misdemeanors are payable, as are such costs accruing in the circuit court, from the convict fund.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of May 19, 1944, is as follows:

"In Re: **State of Alabama vs. Isaac Gilmer** Case No. 79565.

"Will you please give me an opinion on the following:

"On October 8th, 1942, the defendant was tried on the charge of Grand Larceny and the jury, after deliberating twelve hours, was allowed to separate and a mistrial was entered in this case. On October 21st, 1942, the case was again tried and the defendant was found guilty by a jury for Grand Larceny and the Judge sentenced the prisoner to a term of ten years in the penitentiary. The defendant gave notice of appeal, and on March 28th, 1944, the case was affirmed in the Court of Appeals.

"On April 5th, 1944, we mailed a cost bill to the State Department of Corrections and Institutions and in the Clerk's fees, as provided for under Title 45, Sec. 69, we charged two trials, \$1.00, and two judgments, 50 cents. Today the Department returned this cost bill to us with the notation 'only one trial and one judgment paid by the Department'. In

Title 45 Sec. 69 no reference is made to trial (one time) or entering judgment (one time), but it reads 'trials, 50 cents; entering judgment, 25 cents'. Will you please give me an opinion as to whether or not the State Department of Corrections and Institutions should pay us for one trial and one judgment, only or are we entitled to 50 cents for each trial and 25 cents for each judgment.

"We have also had several costs bills returned by the Department of Corrections and Institutions, taking out the complaint of 25 cents and the mittimus of 25 cents, stating these charges are in error. Most of these cases are appeal to us from the Jefferson County Court of Misdemeanors. For example: a defendant is tried in the Jefferson County Court of Misdemeanors and is fined and sentenced to hard labor for the County and he gives notice of appeal to the Circuit Court, and in this Court is again tried and sentenced to hard labor and is sent to the penitentiary to serve his time. Will you please give me the proper costs accrued in the Jefferson County Court of Misdemeanors payable by the State in these appealed cases.

"I will appreciate your prompt attention in giving me your opinion on these questions at your earliest convenience."

In answer to your first inquiry, it is my opinion that the State Department of Corrections and Institutions should pay the circuit clerk fifty cents for trial and twenty-five cents for entering judgment both in the trial resulting in a mistrial and in the subsequent trial in which the defendant was convicted to the penitentiary, provided the total costs in such cases do not exceed the sum of \$250.00.

Title 45, Section 69, Code of Alabama 1940, which Section provides for the payment of certain items of cost out of the convict fund, is as follows:

"Whenever a defendant is convicted, and sentenced to the penitentiary the following items of costs in the case shall be paid out of the convict fund, to the extent and in the manner hereinafter prescribed, to-wit: * * * *"
Title 45, Section 70, Code of Alabama 1940, provides as follows:

"§ 70. Costs shall not exceed two hundred and fifty dollars.—The whole costs paid in any one case shall not exceed two hundred and fifty dollars."

In an opinion rendered by this office to Hon. Roy O. Hill, Circuit Clerk, Houston County, under date of March 4, 1937, Quarterly Report of the Attorney General, Volume 6, page 104, it was held that where the judgment of conviction of a defendant was set aside and a new trial granted, on which new trial he was convicted and sentenced to the penitentiary or to hard labor, the provisions of Section 3667, Code of Alabama 1923 (Section 69, *supra*) authorized the payment of the fees accruing in each of the two trials with the exception of the fee "for issuing capias or warrant (once), fifty cents." It was there held that by limiting payment of this fee to only once, it was not the intention of the Legislature to so limit the payment of other fees provided in said Section. The reasoning set forth in this opinion sustains the conclusion hereinabove reached.

In answer to your second inquiry, your attention is called to Section 13 of Act No. 323, Local Acts of Alabama 1919, page 121, creating the Jefferson County Court of Misdemeanors, which Section is in part as follows:

"In all cases tried in said court the same fees shall be taxed and collected by the clerk as is now allowed or may hereafter be allowed by law in the county courts of Alabama, except as herein otherwise provided. * * * * *

In an opinion rendered by this office to Hon. Hamp Draper, Associate Member, State Board of Administration under date of January 11, 1928, Biennial Report of the Attorney General, 1926-1928, page 412, it was held that where a person is convicted of a misdemeanor in the county court, takes an appeal to the circuit court and is there convicted, the costs accruing in the county court are properly included in the judgment against him for costs. The opinion further held that if the defendant fails to pay the costs so taxed against him, and is sentenced to hard labor for such costs, the items of costs accruing in the county court as well as those items of costs accruing in the circuit court on appeal may be paid from the convict fund under the provisions of Section 3667 (Title 45, Section 69, Code of Alabama 1940.)

Therefore, it is my opinion that those items of cost enumerated in Section 69, supra, accruing in the Jefferson County Court of Misdemeanors may be paid from the convict fund when an appeal is taken from such Court to the Circuit Court of Jefferson County and the defendant is again convicted, sentenced to hard labor and sent to the penitentiary to serve his sentence.

Your attention is called to the fact that Section 69, supra, does not authorize payment from the convict fund of twenty-five cents for taking out the complaint and twenty-five cents for the mittimus in such cases.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 27, 1944.

Hon. S. P. Poyner

Judge of Probate

Houston County

Dothan, Alabama

License Inspectors—Judges of Probate—Citations—Title 13, Sections 276, 280, Title 41, Section 145, Title 51, Section 835, Code of Alabama 1940.

1. Under the provisions of Title 51, Section 835, Code of 1940, the license inspector is required to deliver duplicate citation blanks to the judge of probate or his authorized clerk. It is the duty of the judge of probate to properly file and keep such duplicate citation blanks.

2. The license inspector is entitled to have access to said duplicate citation blanks filed by him in the office of the judge of probate at any time when the probate judge is required by statute to keep his office open for the transaction of business.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of June 19, 1944, is as follows:

"Kindly refer to Title 51, Section 835 of the 1940 Code and advise me with reference to the first part of said Section which I quote as follows: '... and at the same time shall file with the Probate Judge, ... etc.'

"The License Inspector has a pouch in which he places his duplicate citations and which pouch is left in the Probate Office. No filing date appears on any of these duplicates. The License Inspector, as well as the Clerks, has access to the pouch and the pouch is diligently searched when a person applies for a License, but such clerk cannot and does not search in compartments other than that which corresponds with the letter of the Alphabet appropriate to the name of the party cited. It could also happen that the License is sold before the License Inspector brings in the duplicate.

"Please advise me as to the proper interpretation of the law as above quoted. Should these duplicate citation blanks be handed to the Probate Judge or his authorized Clerk and a filing date noted by such Probate Judge or Clerk just as done with Deeds and Mortgages? Just who is responsible for the proper filing and keeping of these duplicate citations, the License Inspector or the Probate Judge? Should the License Inspector have access at all times to the duplicate citations?

"Upon receipt of your reply it is my purpose to work out a system in this office to safeguard against errors which we have been heretofore charged with in issuing Licenses where a citation is pending."

In answer to your first inquiry, it is my opinion that the duplicate blanks should be delivered to the judge of probate or his authorized clerk. However, there is no statute which requires the judge of probate to note on such blanks the date the same were filed with him.

Title 51, Section 835, Code of Alabama 1940, provides in part as follows:

" * * * the license inspector shall thereupon cite such delinquent to appear before the license inspector at the courthouse of the county in which such citation is issued and show cause why the license or privilege tax required by law has not been paid, and at the same time shall file with the probate judge of the county a copy of such citation showing service on the delinquent."

"The word 'file' * * * * in a legal sense means the delivery of the paper or document in question to the proper officer and its receipt by him to be kept on file, and a paper or document is said to be 'filed' when it is delivered to the proper officer and lodged by him in his office. * * * *Creasy v. U. S., D. C. Va., 4 F. Supp. 175, 178*" Words & Phrases, Per. Ed., Volume 16, p. 539. See also *Falley v. Falley*, 163 Ala. 626, 60 So. 894.

Under the provisions of Section 835, supra, when the license inspector issues a citation to a delinquent, he must "at the same time" file with the probate judge a copy of such citation showing service on the delinquent. In showing the service of the citation on the delinquent, while the statute does not so require, the license inspector should show in what manner the service was had and the date of such service. When the license inspector delivers the duplicate citation blank to the probate judge or his authorized clerk, he has properly filed the same as required by Section 835, supra. The practice of merely placing the duplicate citation blanks in a pouch of the license inspector which is kept in the office of the probate judge is not a sufficient filing of the same as required by Section 835, supra.

In answer to your second inquiry, it is my opinion that it is the duty of the Probate judge to properly file and keep the duplicate citation blanks delivered to him by the license inspector.

Title 13, Section 280, Code of Alabama 1940, which defines the duties of the judge of probate, provides in part as follows:

"3. To keep all the books, papers, and records belonging to his office with care and security; the papers arranged, filed and labeled, so as to be of easy reference; * * *"

The duplicate citation blanks filed by the license inspector with the judge of probate as required by Section 835, supra, are "records belonging to his office," and under the provision of Section 280, supra, it is the duty of the probate judge to keep such records with care and security, and to arrange, file, and label them so they may be easily referred to

When the license inspector delivers the duplicate citation blanks to the probate judge or his authorized clerk, he has done all that is required of him by statute. *Phillips v. Beene's, Adm'r.*, 38 Ala. 248; *Falley v. Falley*, *supra*.

Furthermore, under the provisions of Section 835, *supra*, it is the duty of the judge of probate when issuing a license to collect a citation fee, if any, due to the license inspector. In order for the judge of probate to determine whether or not a citation fee is due to the license inspector when a license is issued by him, it is necessary that he keep the duplicate citation blanks in such a manner that he can correctly check the same.

In answer to your third inquiry, I wish to call your attention to the following statutes:

Title 41, Section 145, Code of 1940, which is as follows:

"§ 145. Every citizen entitled to inspect and copy public records.—Every citation has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute."

Title 13, Section 276, Code of Alabama 1940, which is as follows:

"§ 276. Office and office hours.—He must keep his office at the courthouse and open for transaction of business on every day, except Sundays and legal holidays, from nine in the morning until four in the afternoon."

Under the provisions of the above referred to statutes, it is my opinion that the license inspector is entitled to access to the duplicate citation blanks filed by him in the office of the judge of probate at any time when the probate judge is required by statute to keep his office open for the transaction of business.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 28, 1944.

Hon. J. Lee Smith

Judge of Probate

Chilton County

Clanton, Alabama

PARTY MASS MEETINGS TO NAME CANDIDATES FOR GENERAL ELECTION—

1. Political parties may call and hold mass meetings or beat meetings in each voting precinct in the county for the purpose of naming a party candidate to be placed on the ballot prepared for the general election.

2. Such party may also call mass meetings or beat meetings to be held in each voting precinct in the county for the purpose of electing delegates to a county convention, called to name candidates of the party to be placed upon the ballot prepared for the general election.

3. Each of the mass meetings or beat meetings referred to above must be held in a hall, room or place at or in the immediate vicinity of the voting place of the respective precincts of the county and on the second Tuesday in May in presidential election years and on the second Tuesday in August in all other years.

4. These statutory provisions are mandatory.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of June 21, 1944, is as follows:

"The Republican party held no primary in Chilton County for the nomination of officers to be voted on in November. I am herewith enclosing a copy of each of the four notices or advertisements appearing in the local Republican paper, with reference to the selection of nominees and also enclosing a declaration filed by one of the candidates under the corrupt practice act with reference to his nomination as candidate for the office of member of the Board of Education of Chilton County. Some other nominees filed similar notices under the corrupt practice act.

"A question has arisen as to whether or not the names of the nominees could, or should be placed by me on the official ballot. I'm assuming, of course, that the chairman of the party will properly certify the names of the nominees to me as provided by law. I would like to get an early opinion if possible, as to whether or not the nominations were legally made in view of Article 2 of Title 17 of the Code of 1940 of Alabama, with

reference to the holding of mass meetings at places other than voting places, and at times other than the second Tuesday in May of this year. Also please examine the case of Kinney, Judge of Probate vs. House, et al., decided on October 29, 1942, 10 So. (2d) 167.

"In connection with this opinion, please examine Section 145 of Title 17 of the Code of 1940, with reference to the names to be placed on the ballot by the Judge of Probate, and also Section 402 of Title 17 of the Code prescribing penalties on the Judge of Probate in failing to print the names of proper persons on the ballot.

"I would appreciate it if you would advise me as early as convenient whether or not under the circumstances, assuming that the names of the nominees will be properly certified to me by the party officers as provided by law, I should place the names of such nominees on the ballot."

Your request calls primarily for a construction of Title 17, Sections 413-416 of the Code. These provisions are dealing with the mode of nominating candidates whose names are to be placed on the ballot to be prepared for the general election to be held later in the same year.

Section 413 provides that any political party may hold a mass meeting, beat meeting or other like meeting for the purpose of nominating a candidate to be voted for in the general election and that such meeting shall be held at the time and place set forth in the succeeding section—415.

This latter section requires the mass meeting, beat meeting, or other like meeting that is held for the purpose of naming the candidate shall be held in a hall, room, etc., at or in the immediate vicinity of the voting place in the respective precincts or voting districts of the county and that they shall be held on the second Tuesday in May in presidential election years and on the second Tuesday in August in other election years. While Section 413 does not stop to point out any difference, if any, in a mass meeting and a beat meeting it is reasonably clear that whatever the character or name of the meeting it contemplates the holding of these meetings for the purpose of naming a candidate of the party to be voted for in the general election in each of the voting precincts of the county. This is made clear by Section 414. The method of ascertaining the result of such mass and beat meetings is left to the party organization holding such meeting.

These sections also authorize a political party to nominate a candidate at a county convention composed of delegates selected by mass meetings or beat meetings in each voting precinct of the county. The meetings for the purpose of selecting delegates to a county convention to be afterwards held to nominate candidates must be held in a hall, room, etc., at or in the immediate vicinity of the voting place of the respective precincts of the county and must be held at the time prescribed in Section 414—that section provides: "Second Tuesday in May in presidential election years and the second Tuesday in August in other election years" The statute does not prescribe the time or place for holding the convention. That is left to the discretion of the party organization. However, the law does require that whatever method is pursued the result shall be certified in writing to the probate judge of the county under the signature of the presiding officer and secretary of the convention or of the mass meetings, caucuses, or other assembly. All this shall be done not

less than twenty days prior to the date of the general election. **Code**, Title 17, Section 145.

The statute is not very clear as to the certificates of the presiding officer and secretary of the mass meetings or beat meetings. Literally it appears that the certificates must be from such officers in each of the precincts, but your question does not require an opinion on this question, and we leave it for a case where the question is a vital one.

The case before us is one where a convention is held by elected delegates from the precincts of the county. From the attached proceedings to your letter it appears that the proceedings are regular and legal so far. The only thing left open is the filing of the certificate by the presiding officer and secretary of the convention, which may be done any time not less than twenty days before the general election. These statutes under consideration clearly show that they are mandatory and our court has so held. **Kinney, Judge of Probate v. House, et al**, 10 So. 2d 167; Volume 28, **Quarterly Report of Attorney General**, page 178.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 28, 1944.

Hon. O. L. Andrews

Clerk, Circuit Court

Tenth Judicial Circuit of Alabama

Jefferson County

Birmingham, Alabama

Recorder's Courts—Appeals—Witnesses—Fees.

In an appeal to the circuit court from a conviction for the violation of a city ordinance in the recorder's court, the fees of the witnesses are payable as in civil cases.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of May 29, 1944, is as follows:

"There has been some confusion that exists as to the proper fees to be assessed in cases appealed from the Recorders Courts of the several municipalities to the Circuit Court. Should I figure Quasi-Criminal and City Appeal cases under the Civil schedule of Title 11 Chapter One, or under the schedule of Title 11 Chapter Two, costs in Criminal cases?

"Ever since I have been in this office, and so far as I know from the time it was created, the costs in Quasi-Criminal and City Appeal cases have been treated as Criminal cases and the costs have been taxed as costs in Criminal cases. However, as witnesses in these cases are not paid until the costs are actually collected by this office we have been taxing \$1.50 per day and 5 cents per mile to and from the residence as in Civil cases. Will you please let me have this opinion at your earliest convenience?

"Examiners of Accounts checking the records of this office have brought up this question at various times and some are of the opinion that the Civil schedule of fees should apply."

It is my opinion that witnesses appearing in the circuit court in a case appealed from a conviction by a recorder's court for the violation of a city ordinance are entitled to those fees prescribed for witnesses in civil cases.

The appellate courts of Alabama have consistently held that a prosecution for the violation of a municipal ordinance is a quasi criminal proceeding rather than a criminal proceeding, and that the statutory provisions relating to criminal prosecutions by the State are generally inapplicable. See *Shapiro v. City of Birmingham*, 30 Ala. App. 563, 10 So. (2d) 38; *Perry v. State*, 1 Ala.

App. 253, 55 So. 1035; *City of Mobile v. McCown Oil Company*, 226 Ala. 688, 148 So. 402, *City of Selma v Shivers*, 150 Ala. 502, 43 So. 565.

In an opinion rendered to you under date of May 17, 1939, Quarterly Report of the Attorney General, Volume 15, page 183, it was held that the statute prohibiting the payment of more than one fee to a witness attending in one day more than one criminal case did not prevent payment of fees to witnesses appearing both in a criminal case and a quasi criminal case on the same day. It was further held that witnesses appearing in a case appealed from a conviction for the violation of a municipal ordinance received their fees under the provisions of Section 7236, Code of Alabama 1923. This statute, now appearing as Title 11, Section 47, Code of Alabama 1940, and the chapter in which it is found, applies to the payment of witness fees in civil cases only.

Therefore, it is my opinion that witnesses appearing in quasi criminal cases are entitled to those fees allowed to witnesses in civil cases.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 30, 1944.

Hon. Ben C. Morgan, Director

Department of Conservation

Montgomery, 4, Alabama

Conservation—Taxation—United States—State Parks—Title 26
Section 1700 (e), U. S. C. A.

The State is not subject to the Federal tax on cabarets levied under the provisions of Title 26, Section 1700 (e), U. S. C. A., because of the operation in State parks of Rockola music machines, which machines are played by the public by the deposit of five cents therein.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of June 14, 1944, is as follows:

"At some of our State Parks we have Rockola music machines for the convenience of our patrons. Quite a few of the young people dance by them. We make no charge for the right to dance other than the five

cents put into the machine. At some of the parks there are wooden floors in the buildings, and in others simply slag stones.

"As you know the parks are operated without any idea of gain, for the convenience and recreation of the public. Whatever charges are made are simply to cover absolute expenses.

"We have been informed by the Bureau of Internal Revenue that we must pay a cabaret tax in these parks where these Rockolas are used. I believe Mr. James L. Segrest of the Parks Division has discussed the matter with you in detail.

"We would appreciate your opinion as to the legality of any cabaret tax at our State Parks."

It is my opinion that the operation of Rockola music machines by the State parks under the conditions outlined in your letter does not subject the State to the tax levied by the Federal Government on cabarets

The statute levying the federal tax on cabarets, as amended in 1942, is found in Title 26, Section 1700 (e), U. S. C. A., which is in part as follows:

"(e) Tax on cabarets, roof gardens, etc.—(1) Rate. A tax equivalent to 5 per centum of all amounts paid for admission, refreshment, service, or merchandise at any roof garden, cabaret, or other similar place furnishing a **public performance for profit**, by or for any patron or guest who is entitled to be present during any portion of such performance. The term 'roof garden, cabaret, or other similar place' include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. * * * * (Emphasis added.)

One of the latest judicial expressions upon the federal cabaret tax is the case of **Schuster's Wholesale Produce Co., et al v. United States**, 49 Fed. Supp. 909. In that case the court had under consideration the statute levying the tax on cabarets before the 1942 amendment. It was held that under the statute levying the tax (Section 1700 of the Internal Revenue Code as amended by Title 26, Section 542 (a), U. S. C. A.), one of the elements necessary to create a tax liability was a "performance for profit," and in the absence thereof, no tax liability existed.

Although this case did not concern the liability of a State for the federal cabaret tax, it furnishes a guide by which the tax liability in the instant case can be determined, and inasmuch as the 1942 amendment, *supra*, still predicates the tax liability upon the "performance for profit," it is my opinion that the fact that the State does not operate its parks system for profit, but merely for the convenience and recreation of the public, precludes its being subject to the federal cabaret tax even though dancing and the playing of the Rockola music machines are permitted. That deposits of five cents in the machines must be made by the public is immaterial, for the reason that

such charge is designed to cover in part the expenses of operation of the nonprofit parks system of the State.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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